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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WITH BRIEF ANNEXED

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ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the respondent, State of New York. The consent of the respondent

has been obtained and has been filed with this Court. The consent of Mr. Bernard A. Berkman, counsel for petitioner, Lo-Ji Sales, Inc., was requested by letter dated January 12, 1979, but no action has been taken on such request.

Moving party has a special interest in the subject of this appeal, both as the founder and co-counsel for Citizens for Decency through Law, Inc., (short title, "CDL"), and as a member of the Presidential Commission on Obscenity and Pornography. More recently, moving party was granted leave to appear as an amicus curiae in Saul Heller v. The People of the State of New York, October Term, 1972, No. 71-1043,[1] wherein this Court reviewed and upheld the judicial interpretation given to Article 690 of the New York Criminal Procedure Law (Search Warrants), and a seizure under the search warrant therein under attack.

Moving party submits that the definitive interpretations given in Heller, (see Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651, (Dec. 1, 1971)), and in Lo-Ji Sales, Inc., that those procedures are authorized by the New York search warrant statute is completely non-reviewable by this Court. This Court must accept the state court's construction that the issuing Court

1. See Saul Heller v. New York, 409 U.S. 1021, 34 L.Ed.2d 313, 93 S.Ct. 458 (Nov. 20, 1972).

can take a view of the premises which are open to the public and can receive evidence on the items which are offered for sale to the public, and proceed to test its validity on that basis, under the traditional standard of "reasonableness." General Trust Co. v. Blodgett, 287 U.S. 590, 573; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.[2]

In moving party's view, the Petition for Certiorari raises only one (not four) real jurisdictional question for this Court to answer; namely, the reasonableness of the provisions of the search warrant statute as construed by the New York Court of Appeals in Heller and in Lo-Ji Sales, Inc. The argument in support of the "reasonableness" of the New York procedures must keep in proper perspective the responsibility of the members of our State Court systems as Common Law judges to seriously consider the "public morals" values which the alleged unlawful public activities have placed in jeopardy, and the duty of judges to preserve the moral values which are common to our society. It is a

2/ This Court said in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S.Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688: "(W)e accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis).

fundamental rule in our Anglo-Saxon legal system that the Courts are the guardian of the public morals. Rex v. Curl, 2 Strange 789 (1727); Sir Charles Sedley's Case, 1 SID 168.

The New York procedure which permits a "view" of the premises and the reception of autoptical evidence by the issuing judge at the site is an enlightened view. As the Chinese proverb has noted: "One picture is worth more than ten thousand words." Because the common law notion is that obscenity should be proscribed because it presents a moral public nuisance, Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn.) 91; 7 Am.Dec. 632, the "reasonableness" of any proposed seizures may invoke a consideration of a host of variables including a view of the premises and the circumstances surrounding the business itself. See Pinkus v. California, ___ U.S. ___, 56 L.Ed.2d 293, 302, 98 S.Ct. ___ (May 23, 1978):

> "Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' Ginzburg v. United States, supra, at 467, 16 L.Ed.2d 31, 86 S.Ct. 942. We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. Splawn v. California, 431 U.S. 595, 598, 52 L.Ed.2d 606, 97 S.Ct. 1937 (1977); Hamling v. United States, supra, at 130, 41 L.Ed.2d 590, 94 S. Ct. 2887. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation."

Compare the discussion on "nuisance" of Mr. Justice Stevens, speaking in another context in F.C.C. v. Pacifica Foundation, ___ U.S. ___, 57 L.Ed.2d 1073, 1904, 98 S.Ct. ___ (July 3, 1978):

> "The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a 'nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.' Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 71 L.Ed. 303, 47 S.Ct. 114, 4 Ohio.L.Abs. 816, 54 ALR 1016. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."

Moving party believes that the above arguments may not be fully discussed in the respondent's brief and, therefore, respectfully requests that he be granted leave to file a brief amicus curiae setting forth the same on the jurisdictional question posed herein, for such assistance as they may provide to the individual justices sitting herein.

DATED: February 26, 1979.

CHARLES H. KEATING, JR.
Amicus Curiae.

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BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF RESPONDENT.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law (unreported) of Town Justice Frank L. Giza of the Local Criminal Court, Town of Waywayanda, dated November 13, 1976, required by Criminal Procedure

Law section 710.60(4) after a hearing on a motion to suppress physical evidence seized under a search warrant, is set forth in the Petition for Certiorari at pages 1a - 4a.

The order of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts (unreported), held in Nassau County on April 25, 1978, affirming a judgment of the Local Criminal Court, Town of Waywayanda, County of Orange, rendered on February 3, 1977, convicting petitioner, Lo-Ji Sales, Inc., after a plea of guilty to a violation of section 235.05(1), New York Penal Laws (3 counts), is set forth in the Petition for Certiorari at pages 5a and 5b.

The certificate of the New York Court of Appeals (unreported), dated July 5, 1978, denying Lo-Ji Sales, Inc.'s application for leave to appeal on the ground that there is no question of law presented which ought to be reviewed by the Court of Appeals, is set forth in the Petition for Certiorari at pages 7a and 8a.

STATEMENT OF JURISDICTION

The 900 items of evidence which provided the basis for a criminal complaint charging petitioner with three counts of obscenity in the second

degree under New York Penal Law 235.05,[1] were seized under a search warrant issued on June 25, 1976. Petitioner's motion for suppression and return of such items was denied after a hearing held on August 27, 1976. Thereafter, upon a plea of guilty on February 3, 1977, petitioner was convicted on all three counts. The Appellate Term affirmed the conviction by order entered on April 25, 1978.[2] The petitioner's application for leave to appeal was denied by the New York Court of Appeals on July 5, 1978. The Petition for a Writ of Certiorari was filed on September 26, 1978, and was granted on November 27, 1978.

1/ The three counts of the complaint are set forth at page 3a of the Petition for Certiorari, and read:

"Count One: Possesses 400 books which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

Count Two: Possesses 474 movie reels which depicts and describes in an offensive manner deviate sexual intercourse, deviate sexual acts and beastiality.

Count Three: Possesses 26 Movie projectors, five with sound, which depicts and describes in an offensive manner deviate sexual intercourse and deviate sexual acts.

2/ Criminal Practice Law, section 710.70(2) provides:

"2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty."

The jurisdiction of this Court rests on 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the First, Fourth, and Fourteenth Amendments to the Federal Constitution are set forth in this brief at Appendix A-1.

The statutory procedures governing the issuance and execution of search warrants in the State of New York appear in Article 690 (sections 690.05 through 690.55) of the New York Criminal Procedure Law, and are set forth in this brief at Appendix B-1 through B-10.

The applicable statutory procedures governing Lo-Ji Sales, Inc.'s motion to suppress evidence taken under a search warrant, appear in New York Criminal Procedure Law sections 255.10-(1)(f), 255.20, 710.20, 710.50, 710.60, and 710.70, and are set forth in this brief at Appendix C-1 through C-4.

Sections 235.00 and 235.05 of the New York Penal Law are set forth in this brief at Appendix D-1 through D-3.

QUESTION PRESENTED FOR REVIEW

1. Do the statutory procedures governing the issuance and execution of search warrants established by the State Legislature in New York Criminal Procedure Law Article 690 (sections 690.05 through 690.55), as refined by the New York Judiciary in Heller v. New York,[1/] and as further explicated by the New York Judiciary in this cause,[2/] violate the fundamental principles which are expressed in the First, Fourth, and Fourteenth Amendments to the United States Constitution?

1/ In Heller v. New York, the New York Judiciary interpreted the statutory procedures to authorize an issuing judge to hold court and receive evidence at a public theater where a film is being exhibited to the public, for the purpose of making a "probable cause" determination as to the obscenity of a film prior to its seizure under a search warrant.

2/ By denying Lo-Ji Sales, Inc.'s application for leave to appeal herein, the New York Court of Appeal has, by implication, further explicated the statutory procedures to also authorize an issuing judge to hold court and receive evidence at a store where films, books, magazines, and other articles are being exhibited and offered for sale to the public, for the purpose of making a "probable cause" determination as to the obscenity of individual items in such store, prior to their seizure under a search warrant.

STATEMENT OF THE CASE

This case is before this Court on a Writ of Certiorari to review petitioner's conviction, after a plea of guilty to a violation of section 235.05(1) New York Penal Laws. The 900 items of evidence which are described in the criminal complaint, charging the petitioner with three counts of obscenity in the second degree, were seized under a search warrant issued and executed on June 25, 1976. Petitioner's motion for suppression and return of such items was denied after a hearing held on August 27, 1976. Thereafter, on February 3, 1977, petitioner pled guilty and was convicted on all counts. Under Criminal Practice Law, section 710.70(2), the order denying the petitioner's pre-trial motion to suppress evidence is reviewable upon appeal, notwithstanding the fact that the judgment of conviction is entered upon a plea of guilty. On appeal to the Appellate Term of the State of New York for the Ninth and Tenth Judicial Districts, the convictions were affirmed on April 25, 1978, and an application for leave to appeal to the New York Court of Appeals was denied on July 5, 1978.

Petitioner's claim that the 900 items of evidence seized under the search warrant should

have been suppressed on the pre-trial motion is grounded upon an attack on the validity of the New York search warrant statute, Article 690 (sections 690.05 through 690.55) of the New York Criminal Procedure Law,[3/] as construed and applied in Saul Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and by the New York courts in this case below. Those judicial decisions have permitted the issuing judge who is conducting a hearing on an application for a search warrant, to hold Court and receive autoptical evidence (to supplement the required affidavit evidence) at an establishment which is open to the public for business, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items possessed, exhibited, or offered for sale in such business, prior to their seizure under the search warrant.

Petitioner claims that the New York search warrant procedures, as construed and applied by the New York Courts below, violate the First, Fourth and Fourteenth Amendments of the United States Constitution. Amicus submits that the search warrant procedures, as applied to the

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3/ Article 690 (Search Warrants) is set forth in this amicus brief at Appendix B-1 through B-10).

facts in this case are reasonable, and do not violate the federal constitution.

STATEMENT OF FACTS

On June 20, 1976, Investigator Johannes Hurbanek of the New York state police entered petitioner's bookstore in the Town of Wawayanda, where he purchased two motion picture films entitled "Linda and Duke" and "Four for Dinner" offered for sale there (Tr. 4-5,44).[4/] Five days later, on the morning of June 25th, he went to the district attorney's office for Orange County in Goshen, New York, where he found Town of Wawayanda Justice John O'Connor (Tr. 5). Investigator Hurbanek requested the judge to view the two films which Hurbanek had purchased at petitioner's store, and the judge viewed the same that morning at the prosecutor's office (Tr. 6, 42). Investigator Hurbanek then prepared two affidavits; one for a search warrant, and one for a warrant for the arrest, on an obscenity charge, of Alex Mandakis, the clerk who had sold Hurbanek the films (Tr. 6-7). The affidavit in support of the search warrant detailed the purchase of the two films at petitioner's bookstore

4/ The abbreviation "Tr." refers to the Transcript of the hearing on the petitioner's motion to suppress evidence.

by Hurbanek and included an allegation that the affiant believed similar items (films and magazines) were being offered for sale at the petitioner's store and requested that the issuing Court take a view of the store and personally review the similar items which the affiant referred to.[5/] Investigator Hurbanek's affidavit read, in part, as follows:

> "3. In support of your deponent's assertion as to the existence of reasonable cause, the following facts are offered based upon personal knowledge as attested to by your deponent. On June 20, 1976, I personally was present in the aforedescribed premises (Adult Store) and purchased from Alexander Mandakis one reel of 8mm motion picture film approximately 200 feet in length called 'LINDA AND DUKE'. Upon viewing this reel of motion picture film, I observed it to contain acts of female masturbation and activities involving beastiality in that a female participant in the movie attempted to engage in acts of sexual intercourse with a German Shepard type dog. I also purchased a reel of super 8mm motion picture film approximately 200 feet in length entitled 'FOUR FOR DINNER'. Upon viewing this reel of film, I observed acts of sexual intercourse, sodomy, fellatio, cunnilingus, and masturbation. These reels of film are presently in my possession and are available for the viewing of the Court so that it may independently determine whether or not the

5/ Investigator Hurbanek's request is authorized by the last paragraph of Criminal Procedure Law section 690.35 and Heller v. New York, supra. See Appendix to this brief at page B-5.

acts portrayed come within the statutory prohibition under Article 235 of the Penal Law.

"4. While in the premises, I observed what I have reasonable cause to believe are the same or similar films. I also observed in the premises other reels of film, magazines and other objects. Based upon my observations, and my conversations with Mr. Mandakis which indicated to me that the films and magazines portrayed similar activities as described above, I have reason to believe that this material is being possessed in violation of Article 235 of the Penal Law of the State of New York.

"5. The foregoing represents the grounds for my belief.

"6. It is further respectfully requested that the Court accompany deponent at the time of the execution of the warrant applied for so that it can independently determine under the applicable legal principles whether or not any of the additional material present in the aforedescribed premises is in fact possessed in violation of the law and therefore subject to seizure."

The concluding paragraph made the following request.

WHEREFORE, your deponent requests that the Court issue a search warrant directing a search for and seizure of the following property:

1.) 200 foot reels of 8mm motion picture film entitled 'LINDA AND DUKE'.

2.) 200 foot reels of super 8mm motion picture film entitled 'FOUR FOR DINNER'.

3.) Any other material that the Court may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law.

Before the affidavits or warrants were signed, Hurbanek and the judge left the prosecutor's office and proceeded to the town of Wawayanda, where they met with a number of police officers at a traffic intersection (Tr. 9). There, at approximately 10:30 A.M., Hurbanek signed the affidavits and the judge signed the warrants (Tr. 9). At the time the judge signed the search warrant on the morning of June 25, 1976, it was a two-page document (Tr. 88) and read as follows:

LOCAL CRIMINAL COURT
TOWN OF WAWAYANDA
COUNTY OF ORANGE
STATE OF NEW YORK

HONORABLE JOHN O'CONNOR,
ISSUING JUDGE

TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:

You are hereby authorized and directed to search the following premises: a single store brown wood frame building named "Adult Store," located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law:

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The concluding paragraph of the search warrant gave special notice to any persons arrested or charged pursuant to its execution that they were entitled to an immediate adversary hearing, and read as follows:

"The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 25, 1976

Local Justice

At approximately 11:13 A.M., Judge O'Connor and Investigator Hurbanek entered the store. Investigator Hurbanek told Mr. Mandakis that he had a warrant for his arrest and that Judge O'Connor was there to conduct a search of the store. Investigator Hurbanek then advised Mr. Mandakis of his rights under the Fifth and Sixth Amendments to the United States Constitution.

Judge O'Connor viewed parts of 23 films being shown to the public in money operated machines in the front room of the store. After inquiring

of clerk Mandakis whether he had sufficient quarters to activate the film projectors in all 23 booths available for viewing of motion picture films, the clerk, instead, turned on a main switch which allowed the film projectors to be activated without inserting quarters (Tr. 13, 121). Judge O'Connor then went into each of 22 booths which were operable and viewed two to three minutes of each film (Tr. 97). When he was satisfied that there was reasonable cause to believe that the film was obscene under the Penal Law of the State of New York he orally directed the police to seize the film and the projector. Thereafter, 22 films and the film projectors used to exhibit the films in the booths (Tr. 15-17) and four of the coin boxes attached to the booths (Tr. 64, 68) were seized.

After completing the seizure in the booth area, Judge O'Connor proceeded to two rooms in the rear of petitioner's premises, where the judge viewed two to five minutes of each of four motion picture films being exhibited in those rooms (Tr. 16-17, 98). When he was satisfied that there was reasonable cause to believe that a film was obscene under the Penal Law, he ordered its seizure. Thereafter, all four films and the film projectors used for their exhibition were seized (Tr. 16-17).

While Judge O'Connor was reviewing the petitioner's films in the booth area and the two rear rooms, several of the police officers remained in the main room of the store where they placed books and magazines from display cases in piles, in anticipation of an examination of such materials by the Court (Tr. 18-19). Each stack of books represented a different title. If there were five copies of a particular publication in the petitioner's store, all five would be taken from the shelf and stacked in one pile (Tr. 18-19).

When Judge O'Connor completed his examination of the films in the rear of the store, he returned to the main room where the books and magazines were offered for sale in four major display areas (Tr. 20). Moving from one section to another, he employed the same procedure in each display area until each one of the four sections in the main room has been examined. The police were instructed to remove the sealed plastic which enclosed each of the magazines and many of the books in the store (Tr. 19). He then spent "maybe two maybe ten seconds" on each book or magazine, leafing through "two or three pages, half a dozen pages" of each publication (Tr. 98), looking through enough of each magazine so that he could determine whether there was reasonable cause to believe that the individual magazine was obscene

under the New York State Penal Law. Where the Judge was satisfied that there was reasonable cause to believe that the magazine was obscene, he directed the police to seize each and every copy of the magazine being displayed to the public. However, he did not order the police to seize every magazine that he viewed; and accordingly, those magazines that the Judge did not deem obscene were left in the store.

The Court then moved to the one remaining area of the store which had not yet been examined, the counter area where the cash register was located, and where films and other articles were located behind a glass case (Tr. 26-27). The Court instructed clerk Mandakis that it did not intend to view the films in the case, but merely intended to open the boxes in which each of the films was contained (Tr. 26). Mr. Mandakis, the person in charge of the store, told the Judge that it was not necessary to view the film inside the box because all the films were "sex films" and that the picture on the box showed what the film was all about. The Judge then viewed the pictures on the box. When he was satisfied from viewing the picture on the box that there was reasonable cause to believe that the film inside was obscene under the Penal Law, he directed the police to seize it. After viewing the 3 to 4

inch square still photograph on each of the boxes, the judge determined that in each case the 8mm 200 foot film inside the box was obscene (Tr. 36-38, 123-124). Thereafter, he ordered the police to confiscate every copy of each film located in the glass case (Tr. 26, 36-37).

The judge also ordered the seizure of certain articles of clothing displayed on mannequins in the store, including brassieres and panties (Tr. 103). He found the clothing to be obscene because it was displayed in such a way as to "arouse sexuality" and because the clothing was not, in his opinion, the type commonly "used" (Tr. 103). He ordered the clothing seized, as well as the ten mannequins on which the clothing was displayed (Tr. 103, 54-55; A. 39a). Other items seized included a ring toss game and a box containing business records (A. 45a).

During the six hour period in which the search was conducted, the store was open to the public but no sales were made. Mr. Mandakis moved freely throughout the store during the entire day. During that time two or three marked police cars were outside the store. The number of state officials who participated fluctuated between eleven and fourteen (Tr. 69-70), three of whom were uniformed policemen (Tr. 31). Potential customers coming into the store were required

to display some identification to the police. A total of 920 items were seized under the search warrant.[6/]

The Judge left the store at approximately 5:00 P.M. and at that time the police transported all of the items that the Judge directed to be seized to the New York State Police Headquarters, Middletown, New York. Thereafter, two typists from the district attorney's office appeared at the police barracks (Tr. 46) and additions were made to the warrant to include within its authorization all of the items appearing on the list compiled by Investigator Hurbanek during the course of the search (Tr. 96), which had been seized under the Court's oral order (Tr. 12). As the police announced the title or other description of each item that had been seized under the Courts oral order, one typist inserted it in the inventory and the other typist added it to paragraph three of the search warrant (Tr. 46), expanding the search warrant from the two page document that it had been at the time the judge signed it to a document consisting of

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6/ The 920 items are described in the Search and Seizure Receipt and Inventory, prepared pursuant to Criminal Procedure Law, section 690.50(4). A copy of section 690.50(4) is set forth in this brief at Appendix B-9. A copy of the "Receipt and Inventory" appears in this brief at Appendix F-1 through F-15.

sixteen pages (Tr. 34-35; 48-49).

At approximately 11:00 P.M. that evening, the completed warrant was shown to Judge O'Connor who had earlier signed the document (Tr. 85). He assumed that the additions to the warrant were taken from the list he had seen Investigator Hurbanek make in long-hand during the time the search warrant was executed (Tr. 96).

On June 26, 1976, the day after the search, the store was again opened for business.

On July 15, 1976, petitioner was charged with three counts of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 magazines seized at the direction of Judge O'Connor during the course of the search from the tables and walls in the front part of the store. The subject of the second court was approximately 474 reels of film which were seized from the counter in the front of the store at the direction of Judge O'Connor during the course of the search. The subject of the third count was 26 rolls of film seized from the money operated machines in the front and rear of the store at the direction of Judge O'Connor during the course of the search.

By motion dated July 29, 1976, petitioner,

through his attorneys, moved to suppress the evidence seized from the store on June 26, 1976. With the consent of the petitioner's attorney and the People, a suppression hearing was scheduled and held on August 27, 1976, at 2:00 P.M. Prior to the hearing, petitioner asked Judge O'Connor to disqualify himself on the ground that petitioner intended to call the Judge as a witness. Accordingly, the Judge disqualified himself and Town of Wawayanda Justice Frank Giza conducted the hearing. Town Justice Giza submitted written findings of fact and conclusions of law dated November 13, 1976.[7/]

On February 3, 1977, petitioner, through his attorneys, pled guilty to all three counts of Obscenity in the Second Degree and was fined $1,000 on each count. Pending petitioner's appeal to the State Appellate Courts, the State of New York and the Local Justice agreed to stay imposition of the $3,000 fine.

In March of 1977, petitioner abandoned the store and a new corporate owner, Gorunga, Inc. took over possession of the store.

7/ Findings of Fact and Conclusions of Law are required by Criminal Procedure Law, section 710.60(4). (See Appendix C-3 to this brief.) A copy of the Findings of Fact and Conclusions of Law is set forth in this brief at Appendix E-1 through E-4 .

Petitioner appealed Judge Giza's decision to the Appellate Term, Ninth & Tenth Judicial Districts, Supreme Court, State of New York, and on April 25, 1978, the Appellate Term upheld the determination of Town Justice Giza. Thereafter, on July 5, 1978, the New York Court of Appeals denied petitioner's leave to review the Appellate Term's decision. After the New York Court of Appeals refused to review petitioner's appeal, petitioner refused to pay the fine of $3,000 which had been stayed.

SUMMARY OF ARGUMENT

The New York search warrant statute, as construed and applied herein, which permits an issuing judge who is conducting a hearing on an application for a search warrant to hold Court and receive evidence at a business which is open to the public, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items possessed, exhibited or offered for sale at such business, prior to their seizure under a search warrant, does not violate the Fourth Amendment as an unreasonable search and seizure. Said statute is merely an extension of the procedure approved by this Court in Heller v. New York, 413 U.S. 483 (1973).

The construction of Article 690 (Search Warrants) of the Criminal Procedure Law, adopted by the New York Court of Appeals, is binding on this Court. The validity of said statute must be tested on that basis, under the traditional standard of "reasonableness."

The New York procedure which permits an issuing judge to hold Court and receive autoptical evidence at a business which is open to the public, prior to any seizure under the search warrant, is an enlightened view. The "reasonableness" of any

seizure depends upon a host of variables, including the circumstances surrounding the business itself, where a determination must be made that there is "probable cause that the subject matter is obscene." Here the New York Procedure enables the marshalling of evidence which accurately depicts the criminal nature of pandering of that business.

Having received notice through investigator Hurbanek's affidavit of the pandering nature of petitioner's business, the issuing judge had a moral responsibility to respond to the request that he take a view of the premises and examine the stock in trade for "probable cause" as to obscenity. The Courts are the guardians of the public morals. Obscenity is proscribed because it prevents a moral public nuisance, which is in the nature of a "nuisance per se." The common law power entrusts municipal corporations and their officers with not only the right but the obligation to remove said nuisances which are injurious to public health or morality.

The Fourth Amendment does not require that the state exhaust all other possible means of obtaining the materials in question before making application for a search warrant. To require law enforcement to obtain the necessary evidence through purchase of subject films and magazines

with public funds would place an unreasonable burden on the public treasury, especially where evidence of pandering and the quantity of different materials becomes as extensive as in this case. If no procedure is available for recouping the funds from the defendant, an absurd result is achieved, wherein the defendant profits and government suffers from the law enforcement efforts. A single massive purchase, followed by an immediate arrest and seizure of the money paid: (1) fails to solve the problem of how to marshal evidence where no "sale" is involved and the crime alleged is that of "exhibiting" an obscene film in a vending machine; and (2) is subject to attack under a Fourth Amendment claim that the purchase was a sham intended to accomplish an unlawful seizure without the need for a formal search warrant of materials which were presumptively protected by the First Amendment. Two other judicial procedures which have been utilized to obtain evidence in such cases (i.e. the subpoena duces tecum and the restraining order) have likewise proved to be wholly unsatisfactory. The choice between which method to use is to be made on a practical basis, by the prosecutor, and one of the primary consideration should be which method is most likely to secure the evidence and prevent its destruction.

The requirement for pre-seizure judicial scrutiny of allegedly obscene materials compelled the issuing judge to become more intimately involved than in ordinary search and seizure activities by police officials. This requirement places major mechanical burdens on the police and court systems. The technique employed by Judge O'Connor in this case is designed to satisfy both the constitutional requirement of pre-seizure judicial scrutiny and the exigencies of the circumstances.

The issuing judge's oral order of seizure, which was based upon probable cause, amounts to a constitutionally sufficient warrant, even though it was reduced to writing after the actual seizure and inventory. Adequate "safeguards" existed between the police and the defendants, the "higher hurdle" of judicial intervention was provided for, and the added protection of an immediate adversary hearing was present. A search warrant is nothing more than an order of a court, embodying the words of a magistrate which directs a law enforcement officer to carry out the directive of seizing evidence for return to the court for trial. Judge O'Connor's oral seizure order at the store constituted a de facto warrant, and was mandatory whether executed before or after it was reduced to a final draft in the court's records.

The issuing judge need not view each allegedly obscene work in its entirety in order to determine probable obscenity where an examination of the materials themselves and the circumstances surrounding their public distribution adequately provide the requisite amount of probable cause. It would work an intolerable burden upon the courts and law enforcement for this Court to require that the "taken as a whole" concept, as part of the "Miller test", be applied to probable cause determinations to the extent of mandating that a work must be viewed in its entirety before a warrant is justified. A warrant issued ex parte on a factual description is sufficient to "focus searchingly on the question of obscenity," and should be approved. The burden of satisfaction in search and seizure determinations is probable cause and not proof beyond a reasonable doubt. In a review of a finding of probable cause, a great deference should be given to the issuing magistrate and must be in a common-sense, rather than hypertechnical manner.

The determination of an issuing judge to seize allegedly obscene material, made on his own personal knowledge, satisfies the letter and the spirit of the first amendment protection of freedom of expression and of the Fourth Amendment prohibition against unreasonable search and seizure.

The intervention of Judge O'Connor provided a "higher hurdle" and allowed for an opportunity to "focus searchingly on the question of obscenity," ensuring that the courts, and not the police, are the arbiters of obscenity. Judge O'Connor's integrity and neutrality must not be questioned merely because of the surroundings where he held court, nor may his discretion to uphold the tests of the Fourth Amendment be unduly burdened.

The search and seizure in this case was only an initial and temporary restraint. Any individual errors which might have been made by Judge O'Connor could have been corrected the following day in the adversary hearing which Petitioner was offered. Petitioner's failure to request such a hearing was a waiver thereof, and should not be allowed to be used at a later time to claim an unlawful restraint on his ability to "exercise" his choice of expression by selling pornography. Under the circumstances, Judge O'Connor's actions adequately protected all the rights to which Petitioner was entitled under the Constitution, and should be approved.

The states still retain power to develop workable rules governing arrests and searches andseizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided only that those

rules do not violate the Fourth Amendment proscription of unreasonable searches and seizures. "Reasonableness" of the intrusion is determined by the context. The "seizure" employed in the instant case meets the test of "reasonableness" as articulated and interpreted by the Supreme Court.

The activities of the police officers and Judge O'Connor on June 25, 1976 did not constitute a "search" within the meaning of the Fourth Amendment. The capacity to claim the protection of the Fourth Amendment against unreasonable searches depends not upon a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. An overly technical definition of "search" turning upon an artificial hierarchy of events is not to be preferred.

What a person knowingly exposes to the public is <u>not</u> a subject of Fourth Amendment protection. Police officers may walk into a store or other commercial establishment which is open to the public, and observe whatever is in plain sight without committing a "search" within the meaning of the Fourth Amendment.

The Fourth Amendment protects against intrusions into the security and privacy that a person has attempted to surround himself with. It is this

"expectation of privacy" which is the touchstone by which we recognize excessively intrusive governmental activity. Where an individual has chosen to thrust his property into the public view, and in fact, solicit it to public examination of his property, he cannot be heard to complain that his "privacy" has been intruded upon when public officials accept his invitation.

The inclusion of more than a single copy of each item in the seizure order did not constitute a "suppressive" seizure. This Court has not reduced the question of whether a seizure is proper to a mere exercise in counting. Under Heller, supra, the test for the propriety (based on the quantity) of a seizure is essentially twofold: (1) Were the owners of the property afforded a procedure and/or opportunity to avail themselves of a speedy adversary hearing to determine if the seizure had been improper, and (2) Was the seizure so massive and so pervasive as to constitute a prior restraint? These issues must be balanced together with the overall circumstances of the seizure. The Constitutional requirements were met.

In closing, the seizure of the 26 film projectors was proper, both under criminal procedure law, section 690.10(3), as personal property used to commit a crime, and under penal law, section 410.00, as contraband.

For all of the foregoing reasons, this Court should affirm the decision below.

ARGUMENT

I

THE NEW YORK SEARCH WARRANT STATUTE, AS CONSTRUED AND APPLIED HEREIN, WHICH PERMITS AN ISSUING JUDGE WHO IS CONDUCTING A HEARING ON AN APPLICATION FOR A SEARCH WARRANT TO HOLD COURT AND RECEIVE EVIDENCE AT A BUSINESS WHICH IS OPEN TO THE PUBLIC, FOR THE PURPOSE OF MAKING A "PROBABLE CAUSE" DETERMINATION AS TO THE OBSCENITY OF CERTAIN OF THE INDIVIDUAL ITEMS POSSESSED, EXHIBITED OR OFFERED FOR SALE AT SUCH BUSINESS, PRIOR TO THEIR SEIZURE UNDER A SEARCH WARRANT, DOES NOT VIOLATE THE FOURTH AMENDMENT AS AN UNREASONABLE SEARCH AND SEIZURE.

A. Introduction

On the last day of the 1967 Term, this Court, without benefit of briefing on the merits or oral argument, decided Lee Art Theatre v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103, (June 17, 1968). That opinion, brief though it was, created the "adversary hearing" issue and placed in the hands of the pornographers' attorneys a weapon which was to confound and confuse law enforcement for the next five years.

In the Lee Art Theatre case, a seizure of two films under a search warrant which named the films by title as "Rent A Girl," and "Erotic Touch of Hot Skin" (playing as a double bill at a local public theatre) was held to be unlawful. The equivocal language used by the Court was,

at page 1315:

> "The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered obscene' was held to be an unconstitutional seizure in Marcus v. Search Warrant, 367 U.S. 717, 731-732, 6 L.Ed.2d 1127, 1135, 1136, 81 S.Ct. 1708. It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' id., at 732 6 L.Ed.2d at 1136, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U.S. 51, 58-59, 13 L.Ed.2d 649, 654, 655, 85 S.Ct. 734." (Our emphasis).

The Pandora's box which Lee Art Theatre v. Virginia, supra, opened, with its suggestion that the issuing justice of the peace may be required to view the subject matter before issuing the search warrant presented the "red herring" which became one of the central issues in the New York Courts in Heller v. New York, supra, and in a

number of other cases before this Court during the 1972 October Term.[8/]

In 1971, the New York Court of Appeals in Heller v. New York, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651, (Dec. 1, 1971) solved the Lee Art Theater problem by interpreting the New York search warrant statute to authorize an issuing judge, who was conducting a hearing on an application for a search warrant, to hold Court and receive evidence at the public theater where the allegedly obscene film was being exhibited to the public, for the purpose of making a "probable cause" determination as to the obscenity of that film, prior to its seizure under the search warrant

8/ The "adversary hearing" red herring destroyed the effectiveness of law enforcement. The confusion it has engendered permitted the pornographers, in the short period of 10 years to take hard-core pornography, such as the hard-core film, out from under the counter and use in private exhibitions, and extended it to public exhibitions in the sleazy porno theaters on Main Street and in Art Theaters in remote parts of good neighborhoods, then to public audiences in neighborhood store-converted and other regular theater houses (abandoned because of "TV" use and other economic changes), and finally into the family home itself through "TV" use and the video-tape format. If the rule still abides in our Anglo-Saxon legal system that the Courts are the guardians of the public morals, see Rex v. Curl, 2 Strange 789 (1927); Sir Charles Sedley's Case, 1 SID 168, then the decisions of this Court, which have permitted this condition to arise, must be faulted.

therein being applied for. When the New York Court of Appeals, six years later, upheld the judgment of the trial court below in Lo-Ji Sales, Inc., that Court did nothing more than give further definition to the New York Search Warrant Statute and extend the procedure approved by this Court in Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (June 25, 1973) to a commercial store which is alleged to be openly trading in obscene items, so as to authorize an issuing judge who is conducting a hearing on an application for a search warrant, to hold Court and receive autoptical evidence (in lieu of the usual affidavit evidence) at the store where films, books, magazines, and other articles are being exhibited and offered for sale to the public, for the purpose of making a "probable cause" determination as to the obscenity of certain of the individual items in such store, prior to their seizure under the search warrant.

B. The Construction Of Article 690 (Search Warrants) Of The Criminal Procedure Law, Adopted By The New York Court Of Appeals, Is Binding On This Court.

The interpretation given by the New York Court of Appeals in petitioner's case, that the issuing Court can take a view of the premises which are open to the public, and can receive

evidence on the items which are offered for sale to the public at that location is consistent with prior decisions. Saul Heller v. New York, supra. Amicus submits that the definitive interpretations give in Heller, supra, and in Lo-Ji Sales, Inc., that such procedures are authorized by the New York Search Warrant Statute is completely non-reviewable by this Court. This Court must accept the state court's construction and proceed to test its validity on that basis, under the traditional standard of "reasonableness" General Trust Co. v. Blodgett, 287 U.S. 590, 573; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.9/

9/ This Court said in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S. Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688: "(W)e accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis).

C. The New York Procedure Which Permits An Issuing Judge To Hold Court And Receive Autoptical Evidence At A Business Which Is Open To The Public, Prior To Any Seizure Under The Search Warrant, Is An Enlightened View.

As the Chinese proverb has noted: "One picture is worth more than ten thousand words." The "reasonableness" of any seizure depends upon a host of variables, including, where a determination must be made that there is "probable cause that the subject matter is obscene," the circumstances surrounding the business itself. See Pinkus v. California, ___ U.S. ___, 56 L.Ed.2d 293, 302, 98 S.Ct. ___ (May 23, 1978) where this Court held:

> "Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' Ginzburg v. United States, supra, at 467, 16 L.Ed.2d 31, 86 S.Ct. 942. We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. Splawn v. California, 431 U.S. 595, 598, 52 L.Ed.2d 606, 97 S.Ct. 1937 (1977); Hamling v. United States, supra, at 130, 41 L.Ed.2d 590, 94 S.Ct. 2887. In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation."

Paragraphs 3 and 4 of Investigator Hurbanek's affidavit (See Statement of Facts at pages 9 and 10 supra) informed the issuing Court that the two films which he had purchased "Linda and Duke" and "Four for Dinner" depicted female masturbation, attempted sexual intercourse between a female and a German Shepard type dog, sodomy, fellatio, and cunnilingus, and that other films and magazines which were also offered for sale portrayed similar activities. Had Hurbanek played it safe and simply requested the seizure of all copies of the two films which were exhibited to the Court, there is little likelihood that the attack on the search warrant would have been pursued so diligently by Lo-Ji Sales, Inc. The law enforcement result, however, would not have been the same. Without Hurbanek having pursued other means of obtaining the materials in question, the type of misdemeanor complaint which could have been filed against Lo-Ji Sales, Inc. would not have accurately depicted the criminal nature (pandering) of that business (See Statement of Facts at pages 12-17, supra, and the "Receipt and Inventory" of items seized, appearing at Appendix F-1 through F-15 of this amicus brief.)

(1) Having received notice through Investigator Hubanek's affidavit of the pandering nature of petitioner's business, the issuing judge had a moral responsibility to respond to the request that he take a view of the premises and examine the stock in trade for "probable cause" as to obscenity.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardians of the public morals. Rex v. Curl, 2 Strange 789 (1727), Sir Charles Sedley's Case, 1 SID 168. When Judge O'Connor was put on notice through Investigator, Hubanek's affidavit of the pandering nature of petitioner's activity, he had a moral responsibility to respond to Hurbanek's request that he take a view of the premises and examine the stock in trade for probable cause as to "obscenity."

The common law notion was, and is, that obscenity should be proscribed because it prevents a moral public nuisance. Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn.) 91; 7 Am.Dec. 632. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se."

See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pp. 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public

decency."

"Section 24. Wrongs malum in se. -- This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at p. 972:

"Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no

question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at p. 498:

"The rule is declared to be settled, without

dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this abatement power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. . ."

"It is a principle of the common law, that the king cannot sanction a nuisance. . ."

(2) The fourth amendment does not require that investigator Hurbanek exhaust all other possible means of obtaining the materials in question before making application for a search warrant.

Perhaps the simplest means for law enforcement to obtain the necessary evidence would be to purchase the films and magazines with public funds. When the quantity of different materials becomes as large as in this case, however, such costs become an unreasonable burden on the public treasury. Books and magazines in "adult book stores" range from $5.00 to $25.00 a piece and the films and video-tape cassettes range from $50.00 on up to $100.00 and beyond. When the number of different items reaches into the several hundreds, as in this pandering situation, the cost becomes prohibitive. If no procedure is available for recouping the funds from the defendant, an absurd result is achieved wherein the defendant profits and government suffers from the law enforcement efforts (even after payment of a fine). Where large scale pandering is involved, the purchase of such materials is totally impractical and unworkable, except where used as a basis for establishing grounds for a procedure similar to that used in this case.

While it may be suggested that a single massive purchase, followed by an immediate arrest

and seizure of the money paid, would provide an answer, that law enforcement tactic would not solve the problem of how to marshall the evidence where no "sale" was involved and the crime alleged is that of "exhibiting" an obscene film in a vending machine for short periods of time upon the deposit of a quarter in the slot. Further, such a purchase would be subject to attack under a Fourth Amendment claim that the purchase was a sham and was intended to accomplish an unlawful seizure of materials which were presumptively protected by the First Amendment, without the need for a formal search warrant.

Two other judicial procedures which have been utilized to obtain evidence in such cases; the subpoena duces tecum and the restraining order, have proved to be wholely unsatisfactory. A prime example of the inadequacy of the subpoena duces tecum process is shown in a San Gabriel, California Sun news article, dated February 1, 1978 reporting on the history of a two year legal attempt to oust a similar "adult book store" from Alhambra, California. (See Appendix G-1 and G-2 to this amicus brief). An equally frustrating experience with the use of the subpoena duces tecum process in a film case can be found in the files of this Court in Fair, Sheriff of Allen County, Ohio v. Robert Smith and Otis Hatfield,

421 U.S. 902, 43 L.Ed.2d 769, 95 S.Ct. 1549 (Apr. 14, 1975). As to the difficulties had with restraining orders, see the opinion of U.S. District Judge Fitzgerald in Spokane Arcades, Inc. v. Ray, 449 F.Supp. 1145, 1157 (Feb. 6, 1978).

A requirement that a subpoena duces tecum be used in place of the search warrant herein employed could only be justified under some variant of the "less drastic means" concept that ". . . a governmental practice which impairs constitutional values can be successfully challenged on the grounds that an alternate procedure exists which can accomplish more or less the same and at less cost to the threatened values." See note, 86 Harv.L.Rev. 1317, 1322 (1973) and Sheldon v. Tucker, 364 U.S. 479, 488, a First Amendment case wherein this Court stated:

> ". . . Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end could be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose. . ."

There has, unfortunately, been an attempt in recent years to extend the "less drastic means" concept into the Fourth Amendment area. See Stanford Daily v. Zurcher, 356 F.Supp. 124, aff'd

per curiam, 550 F.2d 464 (9th Cir. 1977), wherein Judge Peckham and the Ninth Circuit held that where third persons were operating within an area protected by the First Amendment (publication of a newspaper), a search warrant could not be issued to obtain evidence where it was at all possible to obtain the same material by means of a subpoena duces tecum.

On review, this Court reversed, rejecting both the finding and the analysis, in Zurcher v. Stanford Daily, 436 U.S. 547 at 567:

> "We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at the Stanford Daily to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment."

Further, this Court specifically held that the choice between subpoena and search warrant was one to be made on a practical basis, by the prosecutor, and that one of the primary considerations was which of the two would most likely secure the evidence, and prevent its destruction, at page 562:

> "In the normal course of events, search warrants are more difficult to obtain than subpoenas, since the latter do not involve the judiciary and do not require proof of probable cause. Where, in the real world, subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor. On the other hand, when choice is available under local law and the prosecutor chooses to use the search warrant, it is unlikely that he has needlessly selected the more difficult course. His choice is more likely to be based on the solid belief, arrived at through experience but difficult, if not impossible, to sustain in a specific case, that the warranted search is necessary to secure and to avoid the destruction of evidence."

If this Court is willing to recognize that there exists a likelihood of destruction of evidence by an innocent third party, which is sufficient to justify the issuance of a search warrant, such reasoning becomes even stronger where the evidence is to be obtained directly from the defendant. Such a subpoena duces tecum directed to a defendant would doubtlessly be met with a claim that the evidence required no longer exists, or, as was claimed in the Alhambra case noted above, was sold in the normal course of business.

(3) The requirement for pre-seizure judicial scrutiny of allegedly obscene materials compelled the issuing judge to become more intimately involved than in ordinary search and seizure activities by police officials.

Because of the potential intrusions into areas protected by the First Amendment, this Court has seen fit to rule that the authority of police officers to seize allegedly obscene

materials is much more severely restricted than in the case of other forms of contraband. See, Roaden v. Kentucky, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (June 25, 1973) at page 763:

> "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. (Citations omitted.) The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so, whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' (citations omitted) are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."

The Roaden opinion goes on to establish a higher standard for seizure of materials arguably protected by the First Amendment:

> "Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books of films, calls for a higher hurdle in the evaluation of reasonableness."

Thus, this Court has imposed a requirement

for judicial scrutiny prior to seizure of First Amendment area materials. Further, since such a warrant must, like any other warrant, issue only on probable cause, the judicial officer issuing it must have presented to him sufficient facts to satisfy himself that such probable cause exists. As in any other warrant situation, mere conclusory opinions by police investigators will not support the proper issuance of a warrant. A view of the premises therefore, was clearly warranted.

In the context of a bookstore selling hundreds or even thousands of separate items, many or all of which are claimed to be obscene, this requirement of pre-judicial scrutiny places major mechanical burdens on the police and court systems. The practical problems involved in satisfying constitutional requisites, and at the same time insuring some degree of success against individuals who are both willing and able to exploit the protections of the Fourth Amendment for their own ends, have resulted in a number of innovative techniques. Among these are the viewing and sidewalk signing of a warrant by a judge as used in the Heller case, and the use of telephonic applications for search warrants as authorized under the laws of certain states, (California and Arizona); see United

States v. Turner, 558 F.2d 46. The technique employed by Judge O'Connor in this case is designed to satisfy both the constitutional requirement of pre-seizure judicial scrutiny and the exigencies of the circumstances. The alternative procedures (see discussion above) are unsatisfactory, and no less intrusive upon the rights of the petitioner.

(4) The issuing judge's oral order of seizure, which was based upon probable cause amounts to a constitutionally sufficient warrant, even though it is reduced to writing after the actual seizure and inventory.

One important fact to which attention has been drawn away by Petitioner's arguments is that the only difference, regarding the legal status of the judicial intervention and effect of the magistrate's order, between the instant case and the actions of the judge in Heller v. New York, supra, is that the judge in Heller reduced his order to writing immediately after his viewing and before the seizure. The judges in both this case and Heller "held court" at the business establishment for the purpose of taking evidence and a seizure took place immediately thereafter. In Heller, supra, the judge viewed the movie and signed a warrant, while at the theater, autho rizing both the seizure of the film and the

arrest of the exhibitors, and the order was immediately carried out by the police. In this case, the judge viewed two entire films before going to the store and issued a search warrant for these films, and thereupon adjourned his court to consider further evidence at the store which he felt would probably lead to further probable cause to order additional search and seizure. At the Petitioner's store, the judge examined the materials, ordered their immediate seizure and inventory, and then reduced his oral order to writing. The "safeguards" existing between the police and the defendants were the same in each instance. The "higher hurdle" of judicial intervention was equally provided for, with the added protection of an "immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law". (See page 12, supra)

It cannot be avoided that Judge O'Connor's oral seizure order at the store constituted a de facto warrant, even if not pro forma until later entered into the written warrant as an inventory and specification. A search warrant is nothing more than an order of a court, embodying the words of a magistrate, which directs

a law enforcement officer to carry out the directive of seizing evidence for return to the court for trial. The judge's order is mandatory whether executed before or after it is reduced to final draft in the court's records. Such happens every day when a judge sentences a defendant to imprisonment and orders the bailiff or police to remand a prisoner into custody, and then signs a commitment order or judgment entry. The legal effect of Judge O'Connor's orders at this store were nonetheless mandatory and proper.

Situations such as this are provided for by law in the New York Judiciary Law, Section 2-b (3), which grants courts the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it". If a court has the power to make a certain kind of decree, it can devise a form of proceeding to carry out that power. Rosenfeld v. Savings Bank of Utica, 173 Misc. 667, 17 N.Y.S.2d 652 (1940); People v. Schnitzler, 18 N.Y.2d 457, 461, 276 N.Y.S.2d 616, 619 (1966). See also: State v. Luck, 353 So.2d 225 (La. Sup. Ct. 1977); and McKinney v. City of Birmingham, 296 So.2d 197 (Ala. Sup. Ct.), cert. denied, 420 U.S. 950 (seizure upheld where judge viewed alleged obscenity, even though no required under law).

The review by this Court of judicially approved and statutorily included procedure adopted by this local New York justice is that of a search warrant, partly written and partly oral, which nevertheless disposes of Petitioner's claims of being the victim of an unlawful "warrantless seizure".

(5) The issuing judge need not view each allegedly obscene work in its entirety in order to determine probable obscenity where an examination of the materials themselves and the circumstances surrounding their public distribution adequately provide the requisite amount of probable cause.

Even though the police officers in this case were executing a search warrant at the immediate direction of Judge O'Connor, the order of the court must be supported by adequate probable cause to believe that a crime was being committed and that the materials themselves were probably obscene. Judge O'Connor was first apprised of the full content and character of two films where were purchased by officer Hurbanek, and the judge further learned, through the officer's affidavit in support of the application for the search warrant, that other similar films and sexually oriented materials were present at the "Adult Store". Mr. Mandakis even admitted that other films, books, and magazines in his

store contained similar depictions and descriptions of explicit sexual conduct. This fact was obviously apparent to Judge O'Connor immediately upon his entry to this establishment. This "Adult Store" was a world unto itself, devoted exclusively to pornography and sexually oriented goods and services, and unmistakenly harkened anyone, who would enter, to explore the prurient paradise therein.

Given these circumstances, it would not be expected to take long to realize what type of "expression" was being "presumptively protected" by this business. Obscenity is not so hard to recognize. This Court's guidelines of Miller v. California, 413 U.S. 15, at 24-25 (1973), can run through one's mind uninterrupted, in the face of such explicit sexual display. In upholding the validity of 18 U.S.C. § 1461, as construed to include the "Miller Test", this Court noted in Smith v. United States, 431 U.S. 291, at 309 (1977), that "the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls".

It would work an intolerable burden upon the courts and law enforcement for this Court to require that the "taken as a whole" concept, as part of the "Miller Test", be applied to probable cause determinations to the extent of mandating

that a work must be viewed in its entirety before a warrant is justified. There have been many cases, following the guidelines of Roaden v. Kentucky, supra, which have held that a search warrant can issue upon a factual description of the contents of the allegedly obscene material being provided to a court by a police officer. See: State v. Burgun, 56 Ohio St.2d 354, 362, 384 N.E.2d 255, 261 (Ohio Sup. Ct. 1978), reh. den. 1-17-79; City of Duluth v. Wendling, 237 N.W.2d 79, 83 (Minn. Sup. Ct. 1975); People v. Hobbs, 375 N.E.2d 1367, 1372-73 (Ill. App. Ct. 1978); Commonwealth v. Mascolo, 375 N. E.2d 17, 21-22 (Mass. App. Ct. 1978); Robinson v. City of Birmingham, 353 So.2d 528 (Ala. Cr. App. 1977), rev. den. 353 So.2d 534 (Ala. Sup. Ct. 1977), cert. den. 56 L.Ed.2d 777 (May 30, 1978); State v. Conaughty, 561 P.2d 554 (Okla. Cr. App. 1977); People v. Schnitzler, supra; United States v. Echols, ___F.2d ___, 4 Med. L. Rep. 1170 (5th Cir. 7-28-78); United States v. Sherwin, 572 F.2d 196, 198 (9th Cir. 1977); United States v. Pryba, 502 F.2d 391, 410 (D.C. Cir. 1974); Peto v. Cook, 364 F. Supp. 1, 4 (S.D. Ohio E.D. 1973). There have also been a few cases where the issuing judge actually viewed the material. Heller v. New York, supra: Western Corp. v. Commonwealth, 558 S.W.2d 605

(Ky. Sup. Ct. 1977); McKinney v. City of Birmingham, supra. Where the reviewing magistrate has the time and opportunity to view a work in its entirety, that is ideal, but where a warrant is issued ex parte on a factual description, this is also sufficient to "focus searchingly on the question of obscenity" and should be approved.

It is well established that the burden of satisfaction in search and seizure determinations is probable cause and not proof beyond a reasonable doubt. Additionally, a review of a finding of probable cause must show great deference to the issuing magistrate and must be in a commonsense, rather than a hypertechnical, manner. United States v. Ventresca, 380 U.S. 102, 109 (1965); People v. Hendricks, 25 N.Y.2d 129, 303 N.Y.S.2d 33, 250 N.E.2d 323 (1969); People v. Shiffrin, 64 Misc.2d 311, 314 N.Y.S.2d 745 (1970); Commonwealth v. Mascolo, supra, at 21-22; People v. Hobbs, supra, at 1372. Under the general rule, practical elements which enter into everyday life, and on which reasonable and prudent men act, are to be considered. People v. Teams, 20 A.D.2d 803, 248 N.Y.S.2d 477 (1964), rev. den. 14 N.Y.2d 943. See also: Brinegar v. United States, 338 U.S. 160, 175 (1949). As simply stated in People v. Rodger, 28 A.D.2d 625, 280 N.Y.S.2d 174 (1967):

> "Probable cause" for issuance of a search warrant exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched.

When a judge does visit an "adult book store", and there exists enough knowledge on his part, plus enough direct and circumstantial evidence that certain materials are probably obscene, there should be no impediment to his ordering their seizure. In this case, Judge O'Connor could consider the contents of the two films he viewed, the fact that this store was exclusively filled with blatantly explicit sexual materials, that the content of the material did not vary as to their explicitness in showing actual scenes of ultimate sexual acts and lack of extraneous written or non-sexual content, and that the store was obviously "pandering" to the prurient appeal of these materials. This supporting evidence surely buttresses the existence of cause to believe that the materials he personally examined were probably obscene and it was therefore within his rightful power to order seizure.

Since Judge O'Connor is to be held to a lesser standard of proof than required for a final determination of obscenity vel non at trial, he should also be allowed the benefit of

the principles which would aid in finding Obscenity at trial. First, the Judge should benefit from the principle that the materials are "sufficient in themselves for the determination of the question" of obscenity. Kaplan v. California, 413 U.S. 115, at 121 (1973) (where the Court noted at 117, the character of the book then before it: "Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.") Second, Judge O'Connor should be able to avail himself of the strong circumstantial evidence that these materials were being "pandered" for their prurient appeal, and this principle alone can determine close cases on individual decisions to order seizure.

This principle is best shown in Ginzburg v. United States, 383 U.S. 463, at 471 (1966), where "Eros" magazine was found obscene "as a whole" when "only four of the 15 articles predominantly appealed to prurient interest . . . (because) . . . like the other publications, its prevasive treatment of sex and sexual matters rendered it available to exploitation by those who would make a business of pandering to the 'widespread weakness for titillation by pornography'." This Court in Ginzburg, at 474-75, announced a rule of law which applies readily in support of Judge O'Connor's findings:

> We preceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question. . . .(T)he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.

The force of this principle was affirmed in Splawn v. California, 431 U.S. 595, 599 (1977), and Hamling v. United States, 418 U.S. 87, 130 (1974), where this Court upheld the right to charge a jury on the consideration of "motives of commercial exploitation" and "circumstances of production, sale, . . . advertising . . . editorial intent . . . "in order to assist the final determination of obscenity. This assistance should be no less for an interim determination of probable obscenity by a magistrate.

(6) The determination of an issuing judge to seize allegedly obscene material, made on his own personal knowledge, satisfies the letter and the spirit of the First Amendment protection of freedom of expression and of the Fourth Amendment prohibition against unreasonable search and seizure.

Putting aside the individual factual conclusions which may be made as to each individual item seized, Amicus submits that the general theory underlying a neutral magistrate visiting an "adult bookstore" and personally determining

probable cause for seizure is well within the letter and spirit of our Constitution. In order to provide a "higher hurdle" and allow for an opportunity to "focus searchingly on the question of obscenity", under Roaden v. Kentucky, supra at 502-04, the intervention of Judge O'Connor was duly provided. The purpose of these safeguards is that the police are not the arbiters of obscenity, it must be the courts. Marron v. United States, 275 U.S. 192, 196 (1972); Andersen v. Maryland, 427 U.S. 463, 480 (1976); Marcus v. Search Warrant, supra at 732; Heller v. New York, supra. Judge O'Connor's integrity and neutrality must not be questioned merely because he held court in such foreboding surroundings. De fide et officio judicis non recipitur quaestio.

Once it is established that a judicial officer may adequately protect the sensitive values of our First Amendment, his discretion to uphold the tests of the Fourth Amendment need not be unduly burdened. As stated candidly by the court in Robinson v. City of Birmingham, 353 So.2d 528, at 530-31 (Ala. Cr. App. 1977), rev. den. 353 So.2d 534 (Ala. Sup. Ct. 1977), cert. den. 56 L.Ed.2d 777 (May 30, 1978):

> In this case, no more artisty is involved than in that of the hit-and-run pervert who scratches his vulgarisms upon the walls of the dirtiest public and private places in the world, to

> vie with the surrounding putrescence from which the normal traveller as soon as possible retreats.
>
> The blatant facts, as shown here, without further detail, enabled the magistrate to make an assessment as to the whole production, to the extent, at least of determining the existence of probable cause.... The searching focus required is necessarily relative and is dependent upon the object focused upon. In this case, no telescope, no microscope, no spectacles were required.

There should be no higher burden upon probable cause than upon the requirement that scienter be shown at trial, at least in those instances where a judge personally handles the material. It is accepted that a defendant need not know that his materials are obscene, or even know the specific contents thereof, where if is clear that he knows the character and nature of the works involved. Smith v. California, 361 U.S. 147, 155 (1959); Hamling v. United States, 418 U.S. 87, 119-23 (1974) (Instruction on "character" approved); Mishkin v. New York, 383 U.S. 502, 510 (1966) ("Character" adequate); United States v. Glassman, 562 F.2d 954 (5th Cir. 1977) (must know of "sexual orientation"); State v. Burgun, supra, 384 N.E.2d, at 262 (Ohio Sup. Ct. 1978) ("character"); Johnson v. State, 351 So.2d 10 (Fla. Sup. Ct. 1977) ("nature or content"):

State v. American Theatre Corp., 244 N.W.2d 56 (Neb. Sup. Ct. 1976) (where magazines sealed in clear plastic). The circumstances inherent in the "adult" pornography industry cannot be ignored when viewed to determine violations of obscenity laws. As stated in People v. Moore, 368 N.E.2d 586, at 588 (Ill. Ct. App. 1977):

> It is well settled in Illinois even casual examination of the cover of a magazine which is obscene is sufficient to establish defendant's liability for violation of the Illinois obscenity statute.... In the instant case the trial court found the defendants knew or should have known from the scenes on the covers of these magazines, the magazines were obscene. Considering all the circumstances surrounding the defendants in these cases: (1) their employment in "adult book stores; (2) their observation of the covers of these magazines; (3) the titles of the magazines; (4) the price of the magazines; and (5) the sale solely to adults....

The New York courts have rendered an opinion approving of Judge O'Connor's method, and Judicially included this as "within the intent and meaning of the statute", in Monserrate v. Upper Court Street Book Store, Inc., 62 A.D.2d 419, 405 N.Y.S.2d 145, at 146 (May 25, 1978):

> The procedure adopted by the County Court in visiting the various stores and making a personal inspection is not required by the statute and is novel and should not be lightly disregarded. The impartial Judge rather than the enforcement authorities was exercising his judgment as to whether the exhibits previously confiscated by the police, but left in each store, were obscene....
> (See also: G.I. Distributors, Inc. v. Murphy, 490 F.2d 1167 (2nd Cir. 1973))

The search and seizure in this case was only an initial and temporary restraint. Any individual errors which might have been made by Judge O'Connor could have been corrected the following day in the adversary hearing which Petitioner was offered. Petitioner's failure to request such a hearing is a waiver thereof, and should not be allowed to be used at a later time to claim an unlawful restraint on his ability to "exercise" his choice of expression by selling pornography.

Amicus submits that, under the circumstances, Judge O'Connor's actions adequately protected all the rights to which Petitioner was entitled under the Constitution, and should be approved.

D. The "Seizure" Employed In The Instant Case Meets The Test Of "Reasonableness" As Articulated And Interpreted By The Supreme Court.

Although this Court's decision in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 18 A.L.R.2d 933, rehearing denied 368 U.S. 871, 7 L.Ed.2d 72, 82 S.Ct. 23, imposed the requirements of the Fourth Amendment and the accompanying exclusionary rule on the states, Mapp did not totally obliterate state laws relating to search and seizure. The states still retain power to develop workable rules governing arrests and searches and seizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided only that those rules do not violate the Fourth Amendment's proscription of unreasonable searches and seizures. See Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 233; Ker v. California, 374 U.S. 23, 10 L.Ed. 726, 83 S.Ct. 1623. Thus, a state is free to develop its own law of search and seizure to meet the needs of local law enforcement.

Recently, in United States v. Chadwick, 433 U.S. 1, the Supreme Court reaffirmed the principle that the Fourth Amendment "protects people, not places," and "more particularly, it protects people from unreasonable governmental

intrusions into their legitimate expectations of privacy." Chadwick, at page 70. The reasonableness of those intrusions is determined by the context (the area in, and circumstances under, which they take place, and the nexus between individual's privacy interests and government interests in searching and seizing.) A liberal construction of the Fourth Amendment protection of "the sanctity of a man's home and the privacies of life" has emphasized the fact that the amendment gives constitutional effect to the common law maxim "a man's house is his castle" and thereby serves to protect the core of an individual's activities and expectations of privacy. However, by attaching the constitutionally protected area of privacy to the individual and the nature of his activities, governmental intrusion has been allowed, in varying degrees, into those activities of the individual in which he manifests no expectation of privacy.

Thus, a sliding scale is established. At one end are a private individual's most personal affairs and effects. Here the strongest justifications for governmental intrusion will be required. At the other end of the scale are those activities which are carried on in an open and public manner, and in which an individual invites the participation and/or cooperation of

other individuals from the public. In this type of activity, the individual has the least expectation of privacy, and therefore governmental intrusion is constitutionally permissible with only a minimal showing of "reasonableness."

The facts of the case presented here fall at the latter end of the scale. Thus, the "reasonableness" standard which must be applied is a minimal one.

E. The Activities Of The Police Officers And Judge O'Connor On June 25, 1976, Did Not Constitute A "Search" Within The Meaning Of The Fourth Amendment.

It is a general rule that the capacity to claim the protection of the Fourth Amendment against unreasonable searches depends not upon a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. An overly technical definition of "search" turning upon an artificial hierarchy of events is not to be preferred. Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868.

Thus, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection, Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507. Although it is recognized that the scope of the Fourth Amendment

protection against unreasonable search extends to a store, Lanza v. New York, 370 U.S 139, 8 L.Ed.2d 384, 82 S.Ct. 1218, it is established that police officers may walk into a store or other commercial establishment which is open to the public, and observe whatever is in plain sight without committing a "search" within the meaning of the Fourth Amendment, Mancusi v. De Forte, 342 U.S 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120; New York v. Finkelstein, 28 Misc.2d 771, 218 N.Y.S.2d 341; New York v. Matherson, 16 N.Y. 2d 509 (Apr. 22, 1965).

In the instant case, both petitioner and respondent agree that the subject premises was a retail store, openingly displaying merchandise to any member of the public who chose to enter, and that such merchandise was available for examination by the public. Further, both petitioner and respondent agree that the public officials (police officers, agents of the public prosecutor, and the judge) entered the subject premises during its normal business hours, and concerned themselves with materials which were on display for sale to the public. Petitioner has not contended that the public officials intruded upon any areas of the building not normally open to the public, nor have they contended that any of the materials in question were seized from

areas of the premises not normally open to the public. Further, the respondents have not contended that any of the materials seized were not on display or were not available for examination and purchase by any member of the public entering the premises. Thus, up to the point of the actual seizure, the group of public officials was doing precisely what the proprietor intended that members of the general public should do: Examine the merchandise of the store.

It is important to recognize that this case does not present the situation of a search conducted by a judicial official. A far different situation would be presented were a group of police officers to present themselves at an individual's home or private office, armed with a judge, expecting to rummage through an individual's private possessions and hoping to find evidence of a crime which could then be ordered searched for and seized by the accompanying judicial officer. The Fourth Amendment protects against intrusions into the security and privacy that a person has attempted to surround himself with. It is this "expectation of privacy" which is the touchstone by which we recognize excessively intrusive governmental activity. See Katz, supra. Thus, where an individual has chosen to thrust his property into the public view,

and in fact, solicit it to public examination of his property, he cannot be heard to complain that his "privacy" has been intruded upon when public officials accept his invitation.

F. The Inclusion Of More Than A Single Copy Of Each Item In The Seizure Order Did Not Constitute A "Suppressive" Seizure.

Petitioners rely on United States v. Thirty-seven Photographs, 402 U.S. 363; Freedman v. Maryland, 380 U.S. 51; Markus v. Search Warrants, 367 U.S. 717; and A Quantity of Books v. Kansas, 378 U.S. 205, for the proposition that any seizure of allegedly obscene materials prior to a full and complete adversary hearing must be limited to a single copy of each item seized. This proposition constitutes a misreading, both of these cases, and this Court's decision in Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (June 25, 1978). It is clear that this Court has not reduced the question of whether a seizure is proper to a mere exercise in counting.

Under Heller, the test for the propriety (based on the quantity) of a seizure is essentially two-fold: (1) Were the owners of the property afforded a procedure and/or opportunity to avail themselves of a speedy adversary hearing

to determine if the seizure had been improper; and (2) Was the seizure so massive and so pervasive as to constitute a prior restraint? As in all examinations of a seizure of property, these issues must, of course, be balanced together with the overall circumstances of the seizure. See Heller at page 752:

> "In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to preserve it as evidence. There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself 'become a form of censorship.' even making the doubtful assumption that no other copies of the film existed."

It is interesting to note that, although petitioners cite Heller, they ignore this particular aspect of the decision. Further, petitioners have made no claim that the seizure of the materials involved a shutting down of the business, nor have they even attempted to claim that no other copies of the films and books seized were owned by or available to them. They merely make the abstract claim that all copies of certain books and films, which were on the premises at the time of the seizure, were removed. An examination of the Search and Seizure Receipt and Inventory (See Appendix F to this brief) shows that, in most

cases, only one or two copies were taken.

The Heller decision further analyzes the necessity of the requirement of a prompt judicial determination of the obscenity issue at page 753:

> "A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pre-trial motion seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired. Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of 'promptness' those delays caused by the choice of the defendant."

In the instant case, the petitioner does not claim that they were denied a prompt hearing. The seizure occurred on June 26, 1976. Petitioners chose to delay 33 days, until July 29, 1976, to move to suppress the evidence seized from the store. Once said motion was made, the hearing was scheduled and held on August 27, 1976, (62 days from the time of the original seizure, but only 29 days after the petitioners finally decided to avail themselves of their right to seek review of the seizure.)

G. The Seizure Of The 26 Film Projectors Was Proper, Both Under Criminal Procedure Law Section 690.10(3), As Personal Property Used To Commit A Crime, And Under Penal Law Section 410.00, As Contraband.

The 26 film projectors which were used in the 26 money operated machines to exhibit films in the booth area constituted personal property which was subject to seizure under section 690. 10 (3) as personal property used for the purpose of commission of an offense (See section 690.10 at appendix B-1 in this brief).

The seizure of the 26 film projectors was also authorized by Penal Law Article 410.00 which provides in part:

> "Any peace officer of this state may seize any equipment used in the. . . projecting of pornographic. . . motion pictures. . . and such equipment. . . shall be subject to forfeiture as hereinafter in this section provided".

See, however, People v. Lo Ji Sales Inc., 403 N. Y.S.2d 181 (Mar. 23, 1978) which refers to such section in a different context and notes: "The constitutionality of this particular section is said to be questionable (citations omitted)."

CONCLUSION

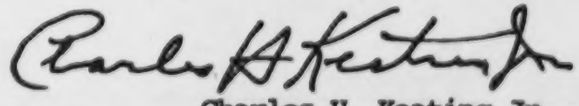
The confusion sponsored by this Court's decision in Lee Art Theater v. Virgina, supra, has not yet run its course. It would indeed be ironic were this Court to now tell the State of New York that, because it had conscientiously followed the per curiam opinion in that case, it was now in error.

The Search and Seizure Receipt and Inventory (See appendix E to this brief) clearly identifies Petitioner Lo-Ji Sales Inc., as an "Emporium for smut" (See Justice Frankfurter's opinion in Smith v. California, 361 U.S. 146, 161; 4 L.Ed.2d 205, 216; 80 S. Ct. 215 (Dec. 14, 1959)). The opportunity for law enforcement to bring such criminal activities under control will never be realized unless and until some muscle is restored to the search warrant authority of the 50 states. A large step in that direction will have been accomplished by this Court's stamp of approval on the New York procedure described herein.

For all of the fore going reasons, the judgment of the court below, should be affirmed.

DATED: February 26, 1979

Respectfully submitted,



Charles H. Keating Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 26th day of February 1979, copies of the within Motion of Charles H. Keating, Jr., for Leave to File as Amicus Curiae in Support of Respondent were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

David S. Ritter
District Attorney of Orange County
Attorney for Respondent
County Government Center
Goshen, N.Y. 10924

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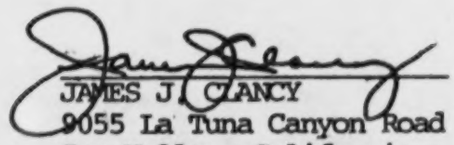

JAMES J. CLANCY
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Sun Valley, California
Attorney for Petitioner

APPENDIX A

United States Constitution, Amendments I, IV, and XIV.

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

APPENDIX B

Criminal Procedure Law, Article 690 (Search Warrants): Sections 690.05, 690.10, 690.15, 690.20, 690.25, 690.30, 690.35, 690.40, 690.45, 690.50, and 690.55.

ARTICLE 690. (Search Warrants):

§690.05. Search warrants; in general; definition.—1. Under circumstances prescribed in this article, a local criminal court may, upon application of a police officer, a district attorney or other public servant acting in the course of his official duties, issue a search warrant.

2. A search warrant is a court order and process directing a police officer to conduct a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant.

§690.10. Search warrants; property subject to seizure thereunder.—Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it:

1. Is stolen; or

2. Is unlawfully possessed; or

3. Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or

4. Constitutes evidence or tends to demonstrate than an offense was committed or that a particular person participated in the commission of an offense.

§690.15. Search warrants; what and who are subject to search thereunder.—1. A search warrant must direct search of one or more of the following:

(a) A designated or described place or premises;

(b) A designated or described vehicle, as that term is defined in section 10.00 of the penal law;

(c) A designated or described person.

2. A search warrant which directs a search of a designated or described place, premises, or vehicle, may also direct a search of any person present thereat or therein.

§690.20. Search warrants; where executable.—1. A search warrant issued by a district court, the New York City criminal court or a superior court judge sitting as a local criminal court may be executed pursuant to its terms anywhere in the state.

2. A search warrant issued by a city court, a town court or a village court may be executed pursuant to its terms only in the county of issuance or an adjoining county.

§690.25. Search warrants; to whom addressable and by whom executable.—1. A search warrant

must be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance. The warrant need not be addressed to a specific police officer but may be addressed to any police officer of a designated classification, or to any police officer of any classification employed or having general jurisdiction to act as a police officer in the county.

2. A police officer to whom a search warrant is addressed, as provided in subdivision one, may execute it pursuant to its terms anywhere in the county of issuance or an adjoining county, and he may execute it pursuant to its terms in any other county of the state in which it is executable if (a) his geographical area of employment embraces the entire county of issuance or (b) he is a member of the police department or force of a city located in such county of issuance.

§690.30. Search warrants; when executable.—1. A search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court without unnecessary delay.

2. A search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 A.M. and 9:00 P.M., unless the

warrant expressly authorizes execution thereof at any time of the day or night, as provided in subdivision five of section 690.45.

§690.35. Search warrants; the application.--1. An application for a search warrant must be in writing and must be made, subscribed and sworn to by a public servant specified in subdivision one of section 690.05.

2. The application must contain:

(a) The name of the court and the name and title of the applicant; and

(b) A statement that there is reasonable cause to believe that property of a kind or character described in section 690.10 may be found in or upon a designated or described place, vehicle or person; and

(c) Allegations of fact supporting such statement. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons containing allegations of fact supporting or tending to support those contained in the application; and

(d) A request that the court issue a search warrant directing a search for and seizure of the

property in question.

3. The application may also contain:

(a) A request that the search warrant be made executable at any time of the day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith; and

(b) A request that the search warrant authorize the executing police officer to enter premises to be searched without giving notice of his authority and purpose, upon the ground that there is reasonable cause to believe that (i) the property sought may be easily and quickly destroyed or disposed of, or (ii) the giving of such notice may endager the life or safety of the executing police officer or another person.

Any request made pursuant to this subdivision must be accompanied and supported by allegations of fact of a kind prescribed in paragraph (c) of subdivision two.

§690.40. Search warrants; determination of application.--1. In determining an application for a search warrant the court may examine, under oath, any person whom it believes may possess pertinent information. Any such examination must be

either recorded or summarized on the record by the court.

2. If the court is satisfied that there is reasonable cause to believe that property of a kind or character referred to in section 690.10, and described in the application, may be found in or upon the place, premises, vehicle or person designated or described in the application, it may grant the application and issue a search warrant directing a search of the said place, premises, vehicle or person and a seizure of the described property. If the court is further satisfied that grounds, described in subdivision three of section 690.35, exist for authorizing the search to be made at any hour of the day or night, or without giving notice of the police officer's authority and purpose, it may make the search warrant executable accordingly.

§690.45. Search warrants; form and content. —A search warrant must contain:

1. The name of the issuing court and the subscription of the issuing judge; and

2. The name, department or classification of the police officer to whom it is addressed; and

3. A description of the property which is the subject of the search; and

4. A designation or description of the

place, premises or person to be searched, by means of address, ownership, name or any other means essential to identification with certainty; and

5. A direction that the warrant be executed between the hours of 6:00 A.M. and 9:00 P.M., or, where the court has specially so determined, an authorization for execution thereof at any time of the day or night; and

6. An authorization, where the court has specially so determined, that the executing police officer enter the premises to be searched without giving notice of his authority and purpose; and

7. A direction that the warrant and any property seized pursuant thereto be returned and delivered to the court without unnecessary delay.

§690.50. Search warrants; execution thereof.—1. In executing a search warrant directing a search of premises or a vehicle, a police officer must, except as provided in subdivision two, give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof before entry and show him the warrant or a copy thereof upon request. If he is not thereafter admitted, he may forcibly enter such premises or vehicle and may use against any person resisting his entry or search thereof as much physical force, other than deadly physical force, as is necessary

to execute the warrant; and he may use deadly physical force if he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

2. In executing a search warrant directing a search of premises or a vehicle, a police officer need not give notice to anyone of his authority and purpose, as prescribed in subdivision one, but may promptly enter the same if:

(a) Such premises or vehicle are at the time unoccupied or reasonably believed by the officer to be unoccupied; or

(b) The search warrant expressly authorizes entry without notice.

3. In executing a search warrant directing or authorizing a search of a person, a police officer must give, or make reasonable effort to give, such person notice of his authority and purpose and show him the warrant or a copy thereof upon request. If such person, or another, thereafter resists or refuses to permit the search, the officer may use as much physical force, other than deadly physical force, as is necessary to execute the warrant; and he may use deadly physical force if he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

4. Upon seizing property pursuant to a search warrant, a police officer must write and subscribe a receipt itemizing the property taken and containing the name of the court by which the warrant was issued. If property is taken from a person, such receipt must be given to such person. If property is taken from premises or a vehicle, such receipt must be given to the owner, tenant or other person in possession thereof if he is present; or if he is not, the officer must leave such a receipt in the premises or vehicle from which the property was taken.

5. Upon seizing property pursuant to a search warrant, a police officer must without unnecessary delay return to the court the warrant and the property, and must file therewith a written inventory of such property, subscribed and sworn to by such officer.

§690.55. Search warrants; disposition of seized property.—1. Upon receiving property seized pursuant to a search warrant, the court must either:

(a) Retain it in the custody of the court pending further disposition thereof pursuant to subdivision two or some other provision of law; or

(b) Direct that it be held in the custody of the person who applied for the warrant, or of the

police officer who executed it, or of the governmental or official agency or department by which either such public servant is employed, upon condition that upon order of such court such property be returned thereto or delivered to another court.

2. A local criminal court which retains custody of such property must, upon request of another criminal court in which a criminal action involving or relating to such property is pending, cause it to be delivered thereto.

APPENDIX C

Criminal Procedure Law, Sections 225.10, 710.20, 710.50, and 710.70.

§ 225.10. Definitions

1. "Pre-trial motion" as used in this article means any motion by a defendant which seeks an order of the court:

(f) suppressing the use at trial of any evidence pursuant to article 710; or

§ 255.20. Pre-trial motions; procedure

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be made within forty-five days after arraignment and before commencement of trial, or made prior to entry of judgment...

§ 710.20. Motion to suppress evidence; in general; grounds for

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissbility thereof in a criminal action against such defendant; or

§ 710.50. Motion to supress evidence; in what courts made

1. The particular courts in which motions to suppress evidence must be made are as follows:

(c) If an information, a simplified information, a prosecutor's information or a misdemeanor complaint is pending in a local criminal court, the motion must be made in such court.

§ 710.60. Motion to suppress evidence; procedure.

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppresed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specifed in subdivision three of section 710.20.

4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath. Upon such hearing, hearsay evidence is admissible to establish to establish any material fact.

5. Provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in

subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set fourth on the record its findings of fact, its conclusions of law and the reasons for its determination.

§ 710.70. Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

APPENDIX D

New York Penal Law, Sections 235.00, and 235.05.

New York Penal Law, Section 235.00:

§ 235.00 *Obscenity; definitions of terms.*

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. 'Obscene.' Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

5. 'Wholesale promote' means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. 'Simulated' means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. 'Sodomy' means any of the types of sexual conduct defined in subdivision two of section 130.00

provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered."

New York Penal Law, Section 235.05:

"§ 235.05 *Obscenity in the second degree.*

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor."

APPENDIX E

Opinion of State of New York, County of Orange, Local Criminal Court, The People of the State of New York v. Lo-Ji Sales, Inc., Findings of Fact and Conclusions of Law, dated November 13, 1976.

OPINION OF STATE OF NEW YORK, COUNTY OF ORANGE, LOCAL CRIMINAL COURT

STATE OF NEW YORK: COUNTY OF ORANGE
LOCAL CRIMINAL COURT: TOWN OF WAYWAYANDA
----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LOJI SALES, INC.,

Defendant.

----------X

The defendant having moved for suppression of all evidence seized in a raid at the Adult Store, New Hampton, New York, a hearing was held to determine the issues raised. Upon completion of said hearing I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

On June 25th, 1976 at approximately 9:00 A.M., Mr. Johannes Hurbanek, an investigator with the B.C.I. met Town Justice John O'Connor at the District Attorney's office in Goshen, New York. Mr. Hurbanek showed Justice O'Connor two films he had previously purchased at the Adult Store. Mr. Hurbanek then made out an affidavit for the search warrant. Judge O'Connor issued the search warrant. Mr. Hurbanek thwn asked Judge O'Connor to accompany him to the Adult Book Store

to make Judicial determination of obscene material and to seize any said obscene material. At the intersection of Denton Hill Road and Route 17M in the Town of Waywayanda, they met with other police officers at which time Judge O'Connor signed the search warrant and also issued a warrant of arrest. At about 11.13 A.M. they entered the store. Mr. Hurbanek advised Mr. Mandakis of his rights and advised him that he was under arrest for Obscenity Second Degree. He was also advised that the officer had a search warrant and that Judge O'Connor was present to make a determination on all the material in the store. Mr. Mandakis offered to turn on the main switch so that Judge O'Connor could view the movies without putting any quarters into the machines. The Judge commenced to go into each booth and view each film while Mr. Hurbanek was taking notes for him. After Judge O'Connor viewed each film enough to make his determination, he ordered the film to be seized. They then went into the two rooms in the back of the building which each contained two separate films. Judge O'Connor viewed the films while Mr. Hurbanek took notes. The Judge ordered that these films also be seized. Judge O'Connor then started to view the magazines, books and newspaper type tablets that were out for sale. Some of the magazines and books had a cellophane wrapping on them and Judge O'Connor directed others in the detail to remove the wrappings so he could view the articles. After viewing the books and magazines he ordered them to be seized. Judge O'Connor followed this same procedure throughout each section of the store viewing each article as Mr. Hurbanek took notes and seized any item as

ordered by Judge O'Connor. The viewing and seizure of articles as Judge O'Connor directed was finished at approximately 5:00 P.M.

CONCLUSIONS OF LAW

I find that Town Justice O'Connor's viewing of each film, book and each piece of material to the extent that he was satisfied that there was reasonable cause to believe that said film, books and material was obscene within the definition of the Penal Law of New York State constituted a proper and adequate Judicial screening was required under (People vs. Heller 29 New York 2nd-319).

That the operator of the store, (Alexander B. Mandakis, Sr.) consented for Justice O'Connor to view each film without inserting any money.

Since Justice O'Connor only examined items that were on display racks, in open view to the public during business hours; after the manager (Alexander B. Mandakis, Sr.) was arrested on warrant; therefore, under People vs. Matherson the Judge could properly view, without buying any material.

That every item was seized pursuant to the search warrant signed by Town Justice John O'Connor; and only after Justice O'Connor independently determined that the seizure of each item was legal and proper.

That since the warrant entitled the defendant to an immediate adversary hearing, the defendant's rights to a neutral and detached determination of obscenity

and prompt, full adversary hearing on the same question of obscenity were not violated in any manner.

I find that there was no massive seizure of material, so that the store was not put out of business for any significant time.

I therefore conclude that all the procedures followed by the police and Justice O'Connor did not violate any of the defendant's constitutional or statutory rights.

Therefore, the defendant's motion to suppress the physical evidence is denied in each and every respect.

The foregoing constitutes the decision and order of the Court.

DATED: New Hampton, New York
November 13, 1976

S/ FRANK L. GIZA
Frank L. Giza
Town Justice
Town of Waywayanda

APPENDIX F

Search and Seizure Receipt and Inventory.

NEW YORK STATE POLICE
SEARCH AND SEIZURE
RECEIPT AND INVENTORY

LOCAL CRIMINAL COURT
Town of Wawayanda

COUNTY OF ORANGE, N.Y. ss.:

I swear that the following is a true and detailed inventory of all property taken by me on the warrant filed herewith:

The following listed items on attached Fourteen (14) pages per direction Town Justice JOHN O'CONNOR, in search warrant issued June 25, 1976.

/s/ J.A. Hurbanek

Subscribed and sworn to before me
this 26th day of June, 1976.

/s/ JOHN O'CONNOR
Town Justice

The following items were seized from the Adult Store on Route 17 pursuant to the execution of a search warrant issued on June 25, 1976:

WALL "A"

1. Pretty #1 (2)
2. Hard Reamers, Volume 1 #1 (1)
3. Sex Act, Book 1 (1)
4. Orgy Too (1)
5. First Me (2)
6. Special Gift (2)
7. Hard-On Heavan (1)
8. Sex and Ecstasy (3)
9. Playful Lovers (2)
10. Hard Act, Volume 1 #1 (1)
11. Primer for Sexual Education, Volume 8 (1)

12. Sex'ionary, Volume 1 #2(1)
13. Enrapt Hairs, Volume 1 #1(1)
14. Lips and Tongue Sex (1)
15. Carnal Knowledge, Volume 2 #3(1)
16. Amour (6)
17. Carnal Book I (2)
18. Sexual Release, Volume 1 #1(1)
19. Hot and Horny (1)
20. Literotica, Volume 1 #1(2)
21. Erotiton Book II (2)
22. Party Girl, #2(1)
23. Sluts (2)
24. Nique (2)
25. Sex Seekers, Volume 1 #1(1)
26. Valerie (1)
27. Afro Fuck Interracial (1)
28. Piss Ass (2)
29. Interplay, Volume 1 #3(1)
30. Orgasm Book I, (2)
31. All Color Poker (2)
32. Sex Strokers, Volume I, #1(2)
33. Sex On Campus (2)
34. Teach Me to Take It (1)
35. Sex Crique (4)
36. Real Sex (4)
37. The American Sex Scene, Volume 4 (1)
38. The American Sex Scene, Volume 3 (3)
39. Sizzling Hot (1)
40. Pleasure Book 2 (2)
41. Fuckum (3)

/s/ JAH

42. Sex and Swinging Single, Volume 1, Book 1 (2)
43. Cherry Pie, Volume 1 #1 (2)
44. The Good Life, Volume 1 #2(1)
45. Single Swingers (5)
46. Answers, Volume 1, #3 (1)
47. Sex Scope, Volume 1, #4 (1)
48. Sex in America, Book 3 (1)
49. Electra, Volume 6 #2 (1)
50. Sexual Pursue, #2 (2)
51. Response, Volume 5 #1 (2)

52. Sex World, Book 5 (1)
53. Women Together, Volume 1 #2 (1)
54. Hell's Bedroom (4)
55. Sex Drive #5 (1)
56. Sex and Pornography #4 (1)
57. Sex and Pornography #1 (1)
58. Hot & Hung (1)
59. Weekend with the Boss (2)
60. The Sex Scene (1)
61. A Dream Cums True (3)
62. Toppers, Volume 1, Book 1 (1)
63. Sexways, Volume 1 #1 (1)
64. Dreamy Sisters (4)
65. A Model Story (1)
66. Informed #3 (1)
67. Informed #7 (1)
68. Informed #5 (3)
69. Sex and the Single State, Volume 1 #1 (1)
70. Fly Her Friendly Thighs (1)
71. Love and Lust (1)
72. Suckfest (3)
73. The Devil Made Me Do It, Volume 1 #3 (6)
74. Get Down With 3 (1)
75. Prince #10 (5)
76. Partner #2 (3)
77. Selecta (2)
78. Prince #11 (2)
80. Anal Sex #12 (1)
81. Con Amore #9 (1)
82. Private #20 (1)
83. Private #18 (2)
84. Dream (1)
85. Climax #208 (1)
86. Climax #207 (1)
87. Prince #8 (3)
88. Danish Games, Volume 1 #7 (1)
89. Partner #1 (1)
90. Partner #4 (5)
91. Ero #5 (1)
92. Ero #6 (1)

/s/ JAH

Books located on center table:

1. Call Boy #5 (1)
2. Virgin Territory (2)
3. The Oriental Split #1 (1)
4. Whoring Hitchhikers, Volume 1 #2 (1)
5. Teen Teasers, Volume 1 #2 (1)
6. Naked (1)
7. Mother Truckers, Volume 1 #3 (1)
8. Throb (6)
9. Switch, Volume 1 #1 (1)
10. Hump #5 (15)
11. World of Love & Sex Book 7 (1)
12. Close-Up, Volume 2 #5 (1)
13. Primates, Volume 1 #1
14. Climax (5)
15. The Many Faces of Philbert Foxhunt (9)
16. Swing #5
17. Erotic Humor, Volume 2 #2 (4)
18. Mike's muscle
19. Greek Lightning (Straight to the End #1 (3)) separate books
20. Coming My Way Stud #1 (2)
21. Les Love, Volume 1 #1
22. Leather Bondage Techniques, Volume 1
23. The Cruiser, Volume 3
24. Visitor's Welcome, Volume 1 #1 (2)
25. The Long Horns, Volume 1 #1
26. Blast Off #2
27. My-Oh-My, Volume 2
28. Garden Tools, Volume 1 #1
29. Humpy Jocks First Issue
30. Finger Licking Good
31. Keep On Coming stud #4
32. Chain Male #3
33. Strangers In the Night #1
34. Head Strong
35. Meat Rack, Volume 1 #1
36. Caught Hot-Handed, Volume 1 #1
37. Swinging in the Rain (2) Far Out #2
38. The Best of Tom #1
39. I'll Pay by the Inch #1
40. Modern Girls #1

41. Enjoy #1
42. Reflections of Youth
43. Sock it to Me (3)
44. The Gay Cure
45. Chicken Delite (3)
46. Aces, Volume 1 #1
47. Prickly Heat Stud #2
48. Stud Time Issue 1
49. Chains

/s/ JAH

50. Combo #1
51. Flesh Parad
52. Mod Age, Volume 1 #4
53. Bodies in Bondage, Volume 1 #3
54. Every Body Needs Meat Stud #3
55. Heavy Hitters, Volume 1 #1
56. Cock Crazy Kids (3)
57. The Best of Tom #2
58. Temptin Teens
59. Genitalia
60. The Phallus

Books located on rear wall:

1. Blast Off #2
2. Coming Up Strong #2
3. Greek Lightning #4
4. Blast Off #1
5. Hard to Handle #2
6. Tongue 'n Cheek
7. The Defiled Facist #4
8. Coming My Way Stud #1
9. Man's Best Friend Kinks #5
10. Keep on Coming Stud #4 (2)
11. Cock Crazy Kids
12. Hard Up House Boy
13. Straight to the End #1
14. Making It Big San Francisco
15. Virgin Territory 2
16. Colorviews (2)
17. Take it as it Comes
18. Prickly Heat Stud #2
19. The New Dudes, Volume 1 #2
20. Try it For Size

21. Leather Bondage Techniques, Volume 4
22. The Cruiser, Volume 3
23. Cock Rings, Chains and Things (2)
24. Hustling Dudes, Volume 1 #1
25. Chicken Delite
26. Tweak
27. I'll Pay By the Inch #1
28. Body Motions
29. Swinging in the Rain
30. The Bigger They Come, Volume 1 #1
31. Erotic Hands (2)
32. Boy Chicks, Volume 1 #1

/s/ JAH

33. Meat Rack, Volume 1 #1
34. The Intruder
35. Brutal Birthday - Knights of the Night #2

Books behind front counter in boxes:

1. Private #22
2. Private #18
3. Private #21
4. Teenagers Loving Weekend, Volume 1 #1
5. Succotash, Volume 1 #2
6. Answers, Volume 5 #3
7. The Sinners
8. Curious #6
9. Marriage Carousel
10. Enjoy
11. Full Swing
12. Sex Reflection #5, Volume 2 #1
13. Sticky Fingers, Volume 1 #1
14. Mated #2
15. The Paperboy LLP-2019
16. Response, Volume 4 #4
17. Pleasure, Volume 1 #2
18. Teacher's Pets SLP/1008
19. Auntee Loves Me
20. Sexscope
21. Substitute Wife #635
22. Teenage Sandwich T-202
23. Sexual Behavior and the Law, Volume 1
24. Hold His Cock T-203
25. Manuals of Sex Magic OSL-9617

26. A Study of Wife Swapping Series 1002

/s/ JAH

Books behind front counter:

1. Liquid Plumber Kinks #6
2. Strangers in the Night #1
3. Mandate, Volume 1 #1
4. Drawn and Quarters #1
5. Gay Studs, Volume 5 #1
6. Afro Fuck
7. Feminine Hygiene and Masturbation
8. Naked Nurses, Volume 6 #4
9. Unnatural Sex Acts
10. Trusting Couple #1, Volume 1
11. Games People Play
12. Orgasm, Volume 1 #1
13. The Teacher's Wife CCP/3013
14. Stick It In
15. Young Hard Studs, Volume 1 #1
16. Hard Heads
17. Hard Up Houseboy
18. The Sinners
19. Stiff Pricks
20. Hot and Horny, Volume 1
21. Head On
22. Solo Sex Female Masturbation, Volume 1
23. Sex Drive #6
24. Dirty Martha
25. The Fucking Freaks
26. Tongue Lashing Ball #4
27. Case Book, Volume 2 #1
28. Get Down with 3
29. Fuck Free
30. Orgy #3 #30
31. Ankh, Volume 6 #2
32. Sexualis, Volume 1 #1
33. Explicit, Volume 2 #2
34. Swingers #31 #3
35. Right-On
36. Triple Headers
37. Around the World
38. Hookers #1
39. Sex, Singles & Society #9630

40. Animal 14

/s/ JAH

The following items seized from projector booth and room:

Booth #1: 1 film depicting two white females, 1 white female, act of sodomy and intercourse - Bolex - 18-5L Projector

Booth #2: 1 film depicting a white male and a Negro female act of sodomy and intercourse - Vivitar Projector

Booth #3: 1 film depicting white male and white female acts of sodomy and intercourse - Vivitar Projector

Booth #4: 1 film depicting white male and white female acts of sodomy and intercourse - Vivitar Projector

Booth #5: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #6: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #7: 1 film depicting two white females, acts of fingering and use of dildos - Vivitar Projector

Booth #8: 1 film depicting 2 white females, and white male, acts of sodomy and intercourse - Vivitar Projector

Booth #9: 1 film depicting a white male and white female, joined by second white male, acts of sodomy and intercourse - Vivitar Projector

Booth #10: 1 film depicting two white males, acts of sodomy - Vivitar Projector

Booth #11: 1 film depicting white male and white female joined by another white male and white female, acts of sodomy and intercourse - Bolex 18/5L Projector

Booth #12: 1 film depicting white female and white male, acts of sodomy and intercourse - Vivitar Projector

Booth #13: 1 film depicting white female and white male, acts of sodomy and intercourse - Urban Industries Projector

Booth #14: 1 film depicting two white females and Negro male, acts of sodomy and intercourse - Vivitar Projector

/s/ JAH

Booth #15: 1 film depicting two white females, acts of sodomy - Urban Industries Projector

Booth #16: 1 film depicting white male and white female, acts of sodomy and intercourse - Vivitar Projector

Booth #17: 1 film depicting acts of sodomy, masturbation, and intercourse in an animated cartoon of "Snow White & the Seven Swarfs" - Vivitar Projector

Booth #18: 1 film depicting white male and white female wherein the white female was covered by various food items which appear to be like a banana split - Vivitar Projector

Booth #20: 1 film depicting three white males, acts of sodomy - 1 Vivitar Projector & Coin Box

Booth #21: 1 film depicting white male and white female, acts of sodomy and intercourse with sound-Videotronic Projector & Coin Box & Speaker

Booth #22: 1 film depicting Negro female and

white male, acts of sodomy and intercourse with sound, Videotronig Projector & Coin Box

Booth #23: 1 film depicting White male and white female, acts of sodomy and intercourse with sound - Videotronic Projector & Coin Box & Speaker

/s/ JAH

Rear Room #1 on left: white male white female, on one film and two negro females and white male on second film - Videotronic Sound Camera & Vivitar Projector

Rear Room #2 on right: 1 film 2 white females 1 white male entitled "Eat Me Good" depicting acts of sodomy and intercourse and 1 film showing 2 white male youths, acts of masturbation and sodomy - Videotronic Sound Camera - Vivitar Projector - Lock Wood Box with Coin Machine Attachment

Front Counter Area: Target System Super 8 self contained cartridge movie projector with sound and 1 cartridge showing white male, white female, acts of sodomy and intercourse.

/s/ JAH

Front Counter Area: 2 Jayark Tricom Super 8 Self Contained Cartridge Movie Projector with sound with three cartridges, depicting acts of sodomy and intercourse.

10 mannequins displaying sexually explicit items of clothing

1 accu-jac unit

/s/ JAH

The following films from the front counter display area:

Dynamite #9
Dominant Trio Part B
Lusty Girls #2
Golden Shower #4 & #3
Kinky Kids KK-4 and KK-6

Sexciting #5
Hot Heroines HHF 1 & 3
Sensuous Strangers 121 & 126
Bottoms Up #6
Sound #43 & 42 & 45
#4 Sup Col
Penthouse #PP17 & 21
Smokers SM-3 (2)
Slice of Cunt
Cock Party
School Girls #1 Reg Coll
Chicks & Dicks
Jade #3 & 6
The Rabbit and The Fox
Piggy & The Cat
Clitoria
Orgy Erotica (2)
Fuck or Else
Tampax Freak
Swinging Maid TW5
Looney birds
Fit For A Queen, No. 1 & 3
Oriental Sexpot (2)
Sensuous Strangers #1, 2, 3
Sensation Sex No. 2
Seduced #7 & #10
Satan #1 (2 copies); #3; #4; #5; #6(2); #9
Porno Classics PC-2
Valentino Series Lez Delivery
Rear End Frolics Presents #1, #2, #3, #4, #5
Cream C6, C7, C8, C9 (3)
White Pussy TF1 (2)
Playmate #26
Oz Films, Slave Fucking
Oz Films Presents, #76, 77, 78 & 79
Screw SP25 & 34, 26, (2), 27, 28, 32, & 36
Hollywood Swingers HS-25 & 26
All The Way #1 (2), 4
Wet & Warm
Junior Cadets #2, 3, 4, & 5
Vamps "n" Tramps

/s/ JAH

The Groovers TGF#1 (2)
Sex Machines SM5 & 6
Pretty Boy #1, 2, 5, 9, PB13, PB15, & PB16
Fucked
Sensation Sex
Sensation Sex, Part 1 (2) & Part 2
Plunge 1
Fit For a Queen No. 4 & 5
Donimo, No. 1 & 4
Knights of the Night NKF 1, 4, 5, & 6
Orange Blossom #6, 7 (2), 9, 10, (2)
Sensuous Strangers #129
Dream Boy (2)
All the Way #2 & 4
Hot Heroines HHF5
Freak Out M-1, M-2, M-3, V-3 (2)
Action #1 (2), 3, 4 (2), 6
The Sex Servants, Part 2, Master of the House
Jocks #1, 2, 3, 4, 5, & 6

The following films from the rear counter display area:

This is a Lasse Braun - LB37 (White Boxes) (6)
Linda & Duke
Green Box depicting girl and Eel
Kinks KSF1, 2, 4 & 6
Sue & Duke
Piggy and the Cat
Sex Machines SM 1
Pretty Boy PB16
Pretty Boy (3 reels taped together)
3 White Boxes marked Male Special
Color Climax #5
Jocks - Scoring a Basket
Junior Cadets ICF 1
Slice of Cunt
Screw SP33, (2), #37
Sensation, Sex, Part 1
Fahrenheit 220 #F1, F2, & F6
Handfucker No. 1710
French Teasers No. 104

Candlelight No. 3
Porno Classics No. 9, 10, 11, 12, 13, 14, 15, & 16
No. 9 Reg Col (Red & Green Box)
Flash Point #1, 2, 3, & 6
Home Maid Love
Sex Bizarre #6
Penthouse #PP18
Farenheit 220 F4
The Sex Lovers, #2, 3

/s/ JAH

Wilder Lust #8
Chicks & Dicks 1, 2, & 5
Lollipop #1, 3, 4, 5, & 7
Hot Stuff 3, 5, & 6
Parisiana #37, (2 copies) #38 (2)
Valentino Series (Hot Dog Man (2)) Cocktails for Two & Stocking Rape
Orange Blossom #7, 8, 9, 10 (2)
7 Red Plastic Boxes #1 (3), 3, (4)
Continental Classics Series 1, #2 & 4, Series 2, #7, 9, 10
2 Sealed Packages consisting of 2 reels containing sex deviates, #7 & X-rated #4
Golden Shower #5
Paris Nights #3
Sexciting #3
Lesbian Dominatrixes Part A
Dog Tamer, K9, Part 1, 2 films; Part 2, 4 films
Back Door (2)
DW58
Thrill #2
Shocking No. LB40, (2), 41, 42
Danish Films #1002 (2), 1004
Action #1, 2, 4, 6
Sex American Style Nos. 1 (2), 3, 4, 5, 6, 7, 8, 9, 10
Venture No. 4, 5, 6, 7, 8
Hollywood Swingers No. HS 23, 25, 27
The Devil in Miss Jones
The Devil in Miss Jones, Parts 1, 2, 3, 4
X-rated 3
The Collection #24, (2), 23, (2), 22, 21

Domino #2, 3, 5
Dynamite #1, (2), #2 (2), 5 (2), 6 (2), 8
Thrill Seekers #1, 3, 4, 5, 6
Pretty Boy #1, (2), 2, & 5
Fit For A Queen #2
Plunge #1, 2, (3)
Freak Out M-2 (2)
Knights of the Night KNF3 (2), 5 & 6
Freak Out M-1 (2)
Fuck-tastik #1, (2), 2, (2), 3 (2), 4 (2), & 5
Heads Up Action #1 through 10
Heads Up Action (white boxes) #1 through 10
America #1-6
Kama Sutra #1 (2), 2 (2), 3 & 4
Lust Films #1 (2), 2 (2), 3 (2), 4 (2), 5 (2)
The Groovers #TGF #1 (2), 2 (4), 3 (3), 4 (4), 5 (3), 6 (2)

/s/ JAH

Tenill Presents Quad Part 1
" " San Francisco Pick Up (2)
" " Child Molester
" " Country Cousins (2)
" " Pretty Pets (2)
" " Teenage Trip

D & W Mink 7
1 Sealed Reel Marked "Color"
1 Reel Marked "Playmate" #26-R-8
1 Reel Marked "The Collection" #22

Magazines:

Party Girls #1 & 2
All Color Special #1 (3), #2 (2), #3, #4 (3)

16MM Films:

Black Angus
This is the Life
Lesbian Paradise
Hindo Life
Cocks Dancing School
R-3 Club

Jade #2 & 4 (8mm films)
Golden Shower #2 (8mm films)
(8mm) TL3
" 1 Reel - Vamps
" 1 Red Reel
" 1 Reel in black box initialed F. L.
" 3 Reels in paper bags marked "shit"

Magazines:

The Oriental Bride (2)
Reward from Teacher
Small Town Beauty
Bayboy, Volume 1 #2
Leather Bondage Techniques, Volume 3
Ooh #11 (2)
Erotic Humor, Volume 2 #1
Love #34 (2)

/s/ JAH

8 plastic bags & 1 large cardboard box containing assorted items of obscene material for over-the-counter sale

1 obscene ring toss game
1 box containing business records
2 paralyzer tear gas aerosol chemical cannisters

/s/ JAH

APPENDIX G

Newsarticle, Sun (San Gabriel, California), dated February 1, 1978, entitled: "Porno Fighters -- Not Down, Not Out!"

San Gabriel, Calif.
Sun
(Cir. W. 14,049)

FEB 1 1978

Allen's P. C. B. Est.

Porno Fighters - - Not Down Not Out!

by Jannlee Moldovan
Division Editor

ALHAMBRA – In the musical "The Unsinkable Molly Brown," the heroine was "down," but not "out." Unlike Molly and in lieu of an unfavorable court ruling in early January, the People Against Obscenity (PAO) is neither down nor out!

The Alhambra-based group sprang up two years ago to wage war on Joseph Espinoza and his controversial El Cid Adult Bookstore located on Main Street. PAO members are not solely Alhambra residents and it is many a neighboring city that keeps an eye to the efforts of the untiring group that has picketed El Cid for more than two years now.

The court ruling, which was handed down by Pasadena Superior Court Judge Henry Shatford, dismissed the City of Alhambra's public nuisance lawsuit against El Cid and threw out a contempt of court action against Espinoza that had been pursued by Alhambra City Attorney Leland Dolley.

In earlier court action, Dolley had subpoenaed more than 250 questionable books and films from the shelves of El Cid. Espinoza failed to bring the subpoenaed items to court stating that a clerk in the bookstore had related to him that all materials had been sold. Shatford accepted the explanation even though Espinoza repeatedly took the Fifth Amendment on questions asked by Dolley regarding the items.

Without the materials, Dolley was unable to proceed with his prosecution in the public nuisance lawsuit and sought contempt of court action against Espinoza. Ultimately, Shatford dismissed the public nuisance lawsuit because, "The plaintiffs were not about to proceed" and, likewise, dismissed the contempt of court charges because, "The only reason Espinoza did not present the items was that he sold them."

David Seinauer, PAO president, in reviewing the events of the last two years, feels PAO has won more times than lost.

"People are placing too much emphasis on the court trial, which in actuality if the city would have won, would only have declared El Cid a public nuisance. The trial was civil in nature, not criminal."

Seinauer continued, "Our picketing is not contingent on the outcome of the trial. We want El Cid closed and will continue to picket until such time that it is."

Seinauer has high praise for Dolley's efforts. "He did an outstanding job but, unfortunately, the final decision rested with Shatford.

"PAO is somewhat discouraged with this setback," said Seinauer, "but look what we've accomplished!"

Seinauer listed six positive points in favor of PAO's efforts.

– "Alhambra has only one adult bookstore. Look at surrounding communities – Whittier, El Monte, Pasadena. They let one in and a dozen more followed.

– "With the support of PAO, the Alhambra City Council passed an ordinance stating that newsracks containing questionable reading material must be manned by a vendor. No vendor – no newsrack. The city is enforcing this ordinance and has encouraged the City of San Gabriel to do the same.

– "PAO has received national recognition and publicity in continuing its picketing efforts over two years. Our persistence has served as an example to other anti-pornography groups.

– "We publish a newsletter – 'Picket Patter,' that is mailed to 1,000 concerned citizens. The newsletter prints educational articles on the affects of pornography and explains the complexities of the law in regards to obscenity. The newsletter also keeps its readers abreast of the current porno scene. There is no subscription rate for the newsletter, although we do welcome donations to defray the cost of printing and mailing. Anyone wishing to be placed on the mailing list should write to P.O. Box 427, San Gabriel, 91778.

– "When the group first organized, we asked each local movie theater manager not to show X rated films. When one theater, following our request, showed "Snuff," PAO picketed and that theater hasn't screened an X rated film since.

– "And, finally, the city has won some cases against El Cid. The bookstore can no longer show coin operated porno films and Espinoza was convicted of selling obscene material, although he was only fined and placed on probation."

Steinauer concluded, "So you see we have won more than we lost. If we have failed anywhere – it's our failure to convince Espinoza we won't quit!"

Barbara Messina, PAO picket coordinator, has strong feelings regarding the court ruling.

"I can only hope that the dismissal leaves residents with the same feeling as I have, angrier and more determined," she stated.

"To quit now would be the beginning of the end. We are fighting for our community and a way of the future. As long as that bookstore is in our community, it is a threat."

Messina continued, "Pasadena is now in the process of organizing an anti-smut campaign because its problem has gotten so intense. Police Chief Robert McGowan stated that the climate created by the presence of pornography does encourage the rapist who is 'an opportunist.' The crime rate in that city jumped by 20 percent, the chief claimed.

"Is that what Alhambra wants to look forward to?" she asked emotionally. "There comes a time and I believe we have reached it, when society is threatened by unbridled obscenity."

In regards to the court ruling, she stated "The public nuisance case was dismissed because according to Judge Shatford the city was not ready to proceed. Judge Shatford took Espinoza's word that the 205 books were sold and did not attempt to find out for himself if this was true, then during the same trial listened to Espinoza take the Fifth Amendment five times. I would like to know how Judge Shatford can justify this decision even to himself. I believe the City of Alhambra really got the shaft from Shatford.

"It is obvious to me that too many judges and many of our elected officials in Sacramento have been taken in and swayed by the bad element. He and others like him have made a big joke out of our democratic due process of law. I urge all citizens, who are unhappy with the performance of any judge, to write to the Judicial Qualifications Committee, 1230 West 3rd Street, Los Angeles."

Messina concluded, "Mayor Williams assures me that the issue is not dead. The city attorney has been instructed by the city council to pursue every avenue. We are not dead and never will be. I hope and pray no one gets discouraged. I'm not."